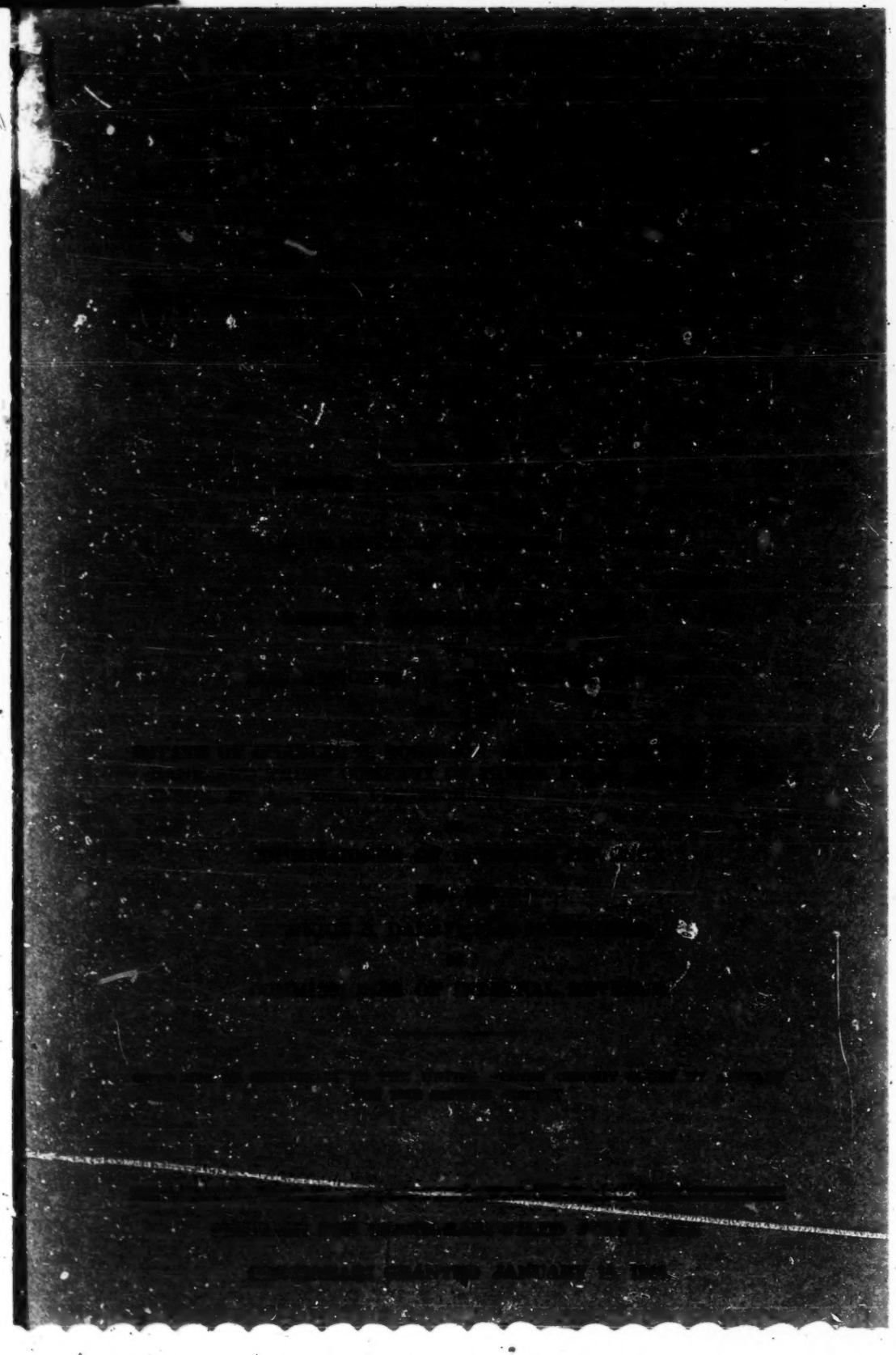

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 130

BESSIE P. DOUGLAS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 131

BESSIE P. DOUGLAS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 132

ESTATE OF CHARLES H. ROBINSON, NORTHWESTERN NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, JESSIE P. ROBINSON, ET AL., ETC., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 133

BERNICE B. DALRYMPLE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 25, 1944.

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[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102870

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 102870

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

BESSIE P. DOUGLAS, Respondent

Docket No. 102869

Estate of CHARLES H. ROBINSON, Northwestern National Bank and Trust Company of Minneapolis, Jessie P. Robinson and Charles J. Robinson, Co-Executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 106705

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER ENLARGING TIME TO FILE TRANSCRIPT OF RECORD

Upon joint motion of counsel for the parties, it is

Ordered that the time for preparation, transmission and delivery of the record sur petitions for review of the above-entitled proceedings in the United States Circuit Court of Appeals for the Eighth Circuit is extended to October 31, 1942.

J. E. Murdock, Member.

Dated: Washington, D. C., August 24, 1942.

[fol. 2] Now Oct. 19, 1942, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal of U. S. Board of Tax Appeals.)

(Endorsed:) Nos. 12,461-2-3-4. Filed in U. S. Circuit Court of Appeals on October 28, 1942.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102870

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: James E. O'Brien, Esq., Kimball B. DeVoy, Esq.

For Comm'r.: E. M. Woolf, Esq., R. C. Whitley, Esq., S. U. Hiken, Esq.

1940

May 22. Petition received and filed. Taxpayer notified. Fee not paid.

May 22. Request for Circuit hearing in St. Paul, Minn. filed by taxpayer.

May 27. Fee paid—check.

May 28. Copy of Petition served on General Counsel.

Jul. 8. Motion to dismiss—rule 6(d)(e) and (h) filed by General Counsel.

Jul. 10. Hearing set July 31, 1940 on motion to dismiss.

Jul. 27. Amended petition filed by taxpayer. 7/29/40 copy served.

Jul. 31. Hearing had before Mr. Kern on motion of respondent to dismiss. Denied. Amended petition filed—usual time allowed to answer.

Jul. 31. Order that motion to dismiss be denied and respondent is allowed 60 days to answer or 45 days to move, entered.

[fol. 3] Aug. 29. Answer filed by General Counsel to amended petition.

Aug. 29. Request for hearing in Saint Paul, Minn. filed by General Counsel.

Sep. 5. Copy of answer and request served on taxpayer. St. Paul, Minn.

Sep. 18. Motion for decision by the Board filed by General Counsel.

Sep. 25. Hearing set Oct. 9, 1940 on motion.

Sep. 30. Motion for a continuance to Oct. 30, 1940 filed by taxpayer. 10/1/40 granted.

Oct. 29. Motion for leave to amend, embodying amendment filed by taxpayer. 10/29/40 copy served.

Oct. 30. Hearing had before Mr. Murdock on motion of respondent for decision—denied and on motion of petitioner to amend—withdrawn. Notice of appearance of J. E. O'Brien and Kimball B. DeVoy filed at hearing.

Oct. 30. Order denying respondent's motion filed Sept. 18, 1940 and leave is granted counsel for the petitioners to withdraw the motion filed Oct. 29, 1940 for leave to amend the petition, entered.

Nov. 12. Transcript of hearing of 10/30/40 filed.

Dec. 6. Motion for leave to amend, embodying amendment, filed by taxpayer. 12/12/40 granted.

Dec. 14. Copy of motion to amend amended petition served on General Counsel.

1941

Jan. 22. Answer to amendment to amended petition filed by General Counsel. 1/23/41 copy served.

Apr. 28. Hearing set June 16, 1941 at St. Paul, Minn.

May 6. Application for subpoena duces tecum to the Commissioner of Internal Revenue, filed by taxpayer. 5/8/41 subpoena issued.

[fol. 4] June 16. Hearing had before Mr. Turner on merits. Submitted. Counsel moves to consolidate dockets 102869, 70, 71 and 106705—granted. Appearance of Kimball B. DeVoy filed. Stipulation as to facts filed. Memorandum of Law filed. Petitioner's brief due 7/31/41. Respondent's reply brief due Aug. 15, 1941.

Jul. 23. Transcript of hearing of 6/16/41 filed.

Jul. 28. Brief filed by taxpayer. 9/12/41 copy served.

Sep. 27. Reply brief filed by General Counsel.

1942

Apr. 14. Opinion rendered, Turner, Div. 8. Decision will be entered under Rule 50. 4/14/42 copy served.

Apr. 29. Computation of deficiency filed by General Counsel.

May 1. Hearing set May 20, 1942 on settlement.

May 7. Consent to settlement filed by taxpayer.

May 9. Decision entered, Turner, Div. 8.

Aug. 3. Petition for review by U. S. Circuit Court of Appeals, 8th Circuit, with assignments of error filed by Taxpayer.

Aug. 3. Proof of service filed.

Aug. 7. Petition for review by U. S. Circuit Court of Appeals, 8th Circuit with assignments of error filed by General Counsel.

Aug. 12. Proof of service filed.

Aug. 18. Proof of service filed.

Aug. 24. Joint motion for extension of time to Nov. 1, 1942 to prepare and transmit record filed.

Aug. 24. Order enlarging time to Oct. 31, 1942 to prepare and transmit record entered.

Sep. 3. Certified copy of order from the 8th Circuit that the Clerk of the Board transmit to this Court a single consolidated transcript of record and that these proceedings [fol. 5] be consolidated for hearing, briefing, argument and decision; that one brief be filed on behalf of the petitioners and one on behalf of the Commissioner and that the first brief shall be filed by the taxpayer filed.

Sep. 29. Joint praecipe for consolidated record filed.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102869

ESTATE OF CHARLES H. ROBINSON, NORTHWESTERN NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, Jessie P. Robinson and Charles J. Robinson, Co-Executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: James E. O'Brien, Esq., Kimball B. DeVoy, Esq.

For Comm'r.: E. M. Woolf, Esq., R. C. Whitley, Esq., S. U. Hiken, Esq.

1940

May 22. Petition received and filed. Taxpayer notified. Fee not paid.

May 22. Request for Circuit hearing in St. Paul, Minn. filed by taxpayer.

May 27. Fee paid—check.

May 28. Copy of petition served on General Counsel.

Jul. 8. Motion to dismiss—rule 6(d) (e) and (h) filed by General Counsel.

Jul. 10. Hearing set July 31, 1940 on motion to dismiss.

Jul. 27. Amended petition filed by taxpayer. 7/29/40 copy served.

Jul. 31. Hearing had before Mr. Kern on motion of respondent to dismiss. Denied. Amended petition filed—usual time allowed to answer.

[fol. 6] Jul. 31. Order that motion to dismiss be denied and respondent is allowed 60 days to answer or 45 days to move, entered.

Aug. 29. Answer filed by General Counsel to amended petition.

Aug. 29. Request for hearing in St. Paul, Minn. filed by General Counsel.

Sep. 5. Copy of answer and request served on taxpayer. St. Paul, Minn.

Sep. 18. Motion for decision by the Board filed by General Counsel.

Sep. 25. Hearing set Oct. 9, 1940 on motion.

Sep. 30. Motion for a continuance to Oct. 30, 1940 filed by taxpayer. 10/1/40 granted.

Oct. 29. Motion for leave to amend, embodying amendment filed by taxpayer. 10/29/40 copy served.

Oct. 30. Hearing had before Mr. Murdock on motion of respondent for decision—denied and on motion of petitioner to amend—withdrawn. Notice of appearance of J. E. O'Brien and Kimball B. DeVoy filed at hearing.

Oct. 30. Order denying respondent's motion filed Sept. 18, 1940 and leave is granted counsel for the petitioners to withdraw the motion filed Oct. 29, 1940 for leave to amend the petition, entered.

Nov. 12. Transcript of hearing of 10/30/40 filed.

Dec. 6. Motion for leave to amend, embodying amendment, filed by taxpayer. 12/12/40 granted.

Dec. 14. Copy of motion to amend amended petition served on General Counsel.

1941

Jan. 22. Answer to amendment to amended petition filed by General Counsel. 1/23/41 copy served.

Apr. 28. Hearing set June 16, 1941 at St. Paul, Minn. [fol. 7] May 6—Application for subpoena duces tecum to the Commissioner of Internal Revenue, filed by taxpayer.

May 8. Subpoena to Guy T. Helvering issued.

Jun. 16. Hearing had before Mr. Turner on merits. Submitted. Counsel moves to consolidate dockets 102869, 70, 71 and 106705—granted. Appearance of Kimball B. DeVoy filed. Stipulation as to facts filed. Memorandum of Law filed. Petitioner's briefs due 7/31/41. Respondent's reply brief due Aug. 15, 1941.

Jul. 23. Transcript of hearing of 6/16/41 filed.

Jul. 28. Brief filed by taxpayer. 9/12/41 copy served.

Sep. 27. Reply brief filed by General Counsel.

1942

Apr. 14. Opinion rendered, Turner, Div. 8. Decision will be entered under Rule 50. 4/14/42 copy served.

Apr. 29. Computation of deficiency filed by General Counsel.

May 1. Hearing set May 20, 1942 on settlement.

May 7. Consent to settlement filed by taxpayer.

May 9. Decision entered, Turner, Div. 8.

Aug. 3. Petition for review by U. S. Circuit Court of Appeals, 8th Circuit with assignments of error filed by taxpayer.

Aug. 3. Proof of service filed.

Aug. 24. Joint motion for extension of time to Nov. 1, 1942 to prepare and transmit the record filed.

Aug. 24. Order enlarging time by Oct. 31, 1942 to prepare and transmit record entered.

Sep. 3. Certified copy of order from the 8th Circuit that the Clerk of the Board transmit to this Court a single consolidated transcript of record and that these proceed-
[fol. 8] ings be consolidated for hearing, briefing, argument and decision; that one brief be filed on behalf of the taxpayers and one on behalf of the Commissioner and that the first brief shall be filed by the taxpayer filed.

Sep. 29. Joint praecipe for consolidated record filed.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 106705

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: James E. O'Brien, Esq., Kimball B. DeVoy, Esq.

For Comm'r: S. U. Hiken, Esq.

1941

Mar. 20. Petition received and filed. Taxpayer notified. Fee paid.

Mar. 20. Copy of petition served on General Counsel.

Mar. 20. Request for Circuit hearing in St. Paul, Minn. filed by taxpayer. 3/20/41 copy served.

Apr. 22. Answer filed by General Counsel.

Apr. 24. Copy of answer served on taxpayer. St. Paul, Minn.

May 2. Reply to answer filed by taxpayer. 5/2/41 copy served.

May 6. Application for subpoena duces tecum to Commissioner of Internal Revenue filed by taxpayer.

May 8. Subpoena duces tecum to Guy T. Helvering issued.

May 19. Joint motion to set for hearing 6/16/41 at St. Paul, Minn. filed. 5/21/41 granted.

May 22. Hearing set June 16, 1941 at St. Paul, Minn.

[fol. 9] Jun. 16. Hearing had before Mr. Turner on the merits. Appearance of Kimball B. DeVoy filed. Stipulation as to facts filed. Memorandum of Law filed. Petitioner's brief due 7/31/41. Respondent's reply brief due Aug. 15, 1941.

Jul. 23. Transcript of hearing of 6/16/41 filed.

Jul. 28. Brief filed by taxpayer. 9/12/41 copy served.

Sep. 27. Reply brief filed by General Counsel.

1942

Apr. 14. Opinion rendered, Turner, Div. 8. Decision will be entered under Rule 50. 4/14/42 copy served.

Apr. 29. Computation of deficiency filed by General Counsel.

May 1. Hearing set May 20, 1942 on settlement.

May 7. Consent to settlement filed by taxpayer.

May 9. Decision entered, Turner, Div. 8.

Aug. 3. Petition for review by U. S. Circuit Court of Appeals, 8th Circuit, with assignments of error filed by taxpayer.

Aug. 3. Proof of service filed.

Aug. 24. Joint motion for extension of time to 11/1/42 to prepare and transmit record filed.

Aug. 24. Order enlarging time to Oct. 31, 1942 to prepare and transmit record entered.

Sep. 3. Certified copy of order from the 8th Circuit that the Clerk of the Board transmit to this Court a single consolidated transcript of record and that these proceedings be consolidated for hearing, briefing, argument and decision; that one brief be filed on behalf of the petitioner's and one on behalf of the Commissioner and that the first brief shall be filed by the taxpayer filed.

Sep. 29. Joint praecipe for consolidated record filed.

[fol. 10] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED PETITION OF BESSIE P. DOUGLAS IN CASE NO. 102870
—Filed July 27, 1940

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbol: LGE 90D) dated March 9, 1940, and as a basis of her proceeding alleges as follows:

1. That petitioner is an individual, and resides at 2424 Park Avenue, Minneapolis, Minnesota. The return for the period here involved was filed with the Collector for the collection district of Minnesota.

2. The notice of deficiency (a copy of which is attached hereto, marked Exhibit "A", and made a part hereof) was mailed to the petitioner on March 9, 1940.

3. The taxes in controversy are income taxes for the calendar year 1937 and in the amount of $30,024.60 alleged deficiency.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The Commissioner erred in determining that there should be disallowed as a deduction the sum of $7,437.08 deducted from gross income on taxpayer's return for the taxable year 1937 as depletion suffered on the mining property owned by taxpayer known as the Pettit Mine, such action of the Commissioner being in violation of Section 23 (m), Revenue Act of 1936.

(2) The Commissioner erred in determining that there should be included in taxpayer's gross income for the taxable year 1937 amounts received by taxpayer at various times in the years 1929 to 1936 inclusive, totaling $53,299.03, and being equal to the aggregate of deductions for depletion on the said Pettit Mine taken by taxpayer on her returns for the taxable years 1929 to 1936 inclusive, such action of [fol. 11] the Commissioner being in violation of Section 23 (m) and Section 42 of the Revenue Act of 1936.

(3) The Commissioner erred in determining that taxpayer realized in the taxable year 1937 income in the

amount of $53,299.03 by reason of the termination in 1937, of a mining lease on said Pettit Mine without extraction of ore on which advance royalties had been paid and in respect of which depletion had been taken by taxpayer in years prior to 1937, such action of the Commissioner being in violation of Section 22 (a) of the Revenue Act of 1936.

(4) The Commissioner erred in determining that there is a deficiency in petitioner's income tax liability for the taxable year 1937 in excess of $1,158.37.

(5) The Commissioner erred by making the above specified determinations under the provisions of Article 23 (m)-10 of Regulations 94, and corresponding provisions of prior regulations, in violation of Section 22 (a), Section 23 (m), Section 41 and Section 42 of the Revenue Act of 1936.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) Taxpayer owns an undivided one-half fee interest in a particular iron ore mine situated in St. Louis County, Minnesota, known as the "Pettit" mine, and has owned said undivided fee interest since the time the income tax law became effective in March, 1913.

• • • • • • •

(5) In 1929 taxpayer, together with the other fee owners, leased the said Pettit mine to the Republic Steel Company of Youngstown, Ohio, for a period of 30 years, said lease commencing to run July 1, 1929. Taxpayer here, by virtue of her undivided one-half interest in the property, was entitled to one-half of the royalties paid on the said lease.

A. Under the terms of this lease the Republic Steel Company was to pay a royalty of forty (40) cents per ton of ore removed from the said Pettit mine.

B. The lease provided for the payment of minimum royalties of $20,000.00 per year each year during the first [fol. 12] four years of the life of the lease and $40,000.00 per year minimum royalties for the remaining years of the lease, with a proviso that if the said lessee failed to pump out and remove certain water then in the mine, within five years after the lease was entered into, then the minimum royalties were to be $60,000.00 each year during the period that the lessee failed to remove the water from the mine.

C. The lease provided that the lessee was to be entitled to credit for the amount of any and all such minimum royalties paid by it in advance of the removal of ore and was to have a right to have the advance payments applied toward the payment of royalties accruing to the lessor on account of ore mined in excess of the minimum royalty payment, in some subsequent year.

D. The lessee was to have a right to terminate the lease at any time, upon proper notice, except that it was agreed that, at all events, the lease was to remain in full force and effect for seven years from the date of execution.

E. In May, 1933 the lease was amended so as to provide for the payment of $20,000.00 advance royalties per year, for the first five years of the life of the lease instead of the first four years of such life and the lease was further amended so that it could not be terminated by the lessee for eight years instead of seven, as originally provided.

(6) The Republic Steel Company, lessee, entered into possession of the mine in 1929, and, in accordance with the terms of the lease, paid the required minimum royalties until July, 1937. The royalties received by taxpayer here and the depletion taken against the royalties are as follows:

Year	Royalties Received	Depletion Taken
1929	$2,500.00	$1,239.51
1930	10,000.00	4,958.05
1931	10,000.00	4,958.05
1932	10,000.00	4,958.05
1933	10,000.00	4,958.05
1934	12,500.00	6,197.56
1935	22,500.00	11,155.61
1936	30,000.00	14,874.15
1937	15,000.00	7,437.08

[fol. 13] The depletion was taken on the so-called "cost" basis. Total royalties received by petitioner amounted to $122,500.00. Total depletion taken amounted to $60,736.11.

(7) In 1937 the Republic Steel Company voluntarily terminated the lease according to the terms thereof, thereby

releasing all interest which it had in the mining property including the right to remove ore paid for by the minimum royalties.

(8) No ore had been removed from the mine by the said lessee, Republic Steel Company, prior to the time of cancellation.

* * * * * * *

Wherefore, petitioner prays that this Board may hear the proceeding and declare that the Commissioner erred in each of the particulars specified in petitioner's assignments of error herein, and that there is no tax deficiency in excess of $1,158.37 due from petitioner to the United States Government.

James E. O'Brien, Counsel. 808 First National-Soo Line Bldg. Minneapolis, Minnesota.

Dated July 19th, 1940.

Duly sworn to by Bessie P. Douglas. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO AMENDED PETITION

Treasury Department
Internal Revenue Service
St. Paul, Minnesota

Office of Internal Revenue Agent in Charge St. Paul Division, 800 Post Office Building

Mar. 9, 1940.

Bessie P. Douglas, 2424 Park Avenue, Minneapolis, Minnesota

Collection District: Minnesota

Madam:

You are advised that the determination of your income tax liability for the taxable year 1937 discloses a deficiency of $30,024.60 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the internal revenue agent in charge, St. Paul, Minnesota for the attention of LGE-90D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, By C. W. Rink, Internal Revenue Agent in Charge.

Enclosures: Statement Form of waiver.

[fol. 15]

STATEMENT

Bessie P. Douglas,

2424 Park Avenue,

Minneapolis, Minnesota

Tax Liability for Taxable Year Ended December 31, 1937

Income tax	Liability	Assessed	Deficiency
	$36,499.33	$6,474.73	$30,024.60

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 15, 1939; to your protest dated July 5, 1939, and to Statements made at conferences held on September 27, 1939 and November 28, 1939.

A copy of this letter and statement has been mailed to Mr. James E. O'Brien, 808 First National-Soo Line Building, Minneapolis, Minnesota, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income

Net income as disclosed by return		$41,666.89
Unallowable deductions and additional income:		
(a) Adjustment of depletion Corsica Mine	$4,031.14	
(b) Depletion disallowed on Pettit Mine	7,437.08	
(c) Amount included in income equal to depletion deductions allowed in years prior to 1937	53,299.03	
(d) Cost of preparation of return	125.00	64,892.25
Net income adjusted		106,559.14

Explanation of Adjustments

(a) To adjust depletion on Corsica Mine to the amount allowable as shown below:

199642 ton- at $.166216 per ton	$33,183.69
Less: 20% of depletion allowable to husband, George P. Douglas	6,636.74
Depletion allowable	26,546.95
Depletion claimed	30,578.09
Adjustment of depletion on Corsica Mine	4,031.14

(b) Under conditions known to exist during the year 1937, it is held that no depletion is allowable for that year [fol. 16] as the result of the receipt by you of advance or minimum royalties under the provisions of the lease agreement with the Republic Steel Company relating to the Pettit Mine.

(c) For the taxable years 1929 to 1936, inclusive, you claimed and were allowed depletion aggregating $53,299.03 in respect of minimum or advance royalties under the lease agreement with the Republic Steel Company relating to the Pettit Mines, pursuant to the provisions of the Regulations then in force corresponding to Article 23(m)-10 of Regulations 94. Such regulations provided that if for any reason the mineral lease expires or terminates or is abandoned before the mineral which has been paid for in advance has

been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned. The lessee failed to remove any ore from the mine, and during the year 1937 elected to terminate the above-mentioned lease agreement and abandoned the right to extract and remove the mineral which had been paid for by minimum or advance royalties paid in prior years. It is held that in accordance with the provisions of Article 23(m)-10 of Regulations 94, and corresponding provisions of prior regulations, you derived income in the year 1937 equal to the amounts so deducted and allowed as depletion in prior years.

(d) This represents the disallowance of amount paid in connection with the preparation of your income tax return. This does not represent an ordinary and necessary business expense incurred in connection with your business as required by section 23(a) of the Revenue Act of 1936.

Computation of Tax

Net income adjusted	$106,559.14
Less: Personal exemption	2,500.00
Balance (surtax net income)	104,059.14
Less: Earned income credit (10% of $3,000.00)	300.00
Net income subject to normal tax	103,759.14
[fol. 17] Normal tax at 4% on $103,759.14	4,150.37
Surtax on $104,059.14	32,354.31
Total tax	36,504.68
Less: Income tax paid at the source	5.35
Corrected income tax liability	36,499.33
Income tax assessed:	
Original, Account No. 200371	6,474.73
Deficiency of income tax	30,024.60

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER OF COMMISSIONER OF INTERNAL REVENUE TO AMENDED PETITION OF BESSIE P. DOUGLAS IN CASE NO. 102870—Received and Filed August 29, 1940

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1937, as alleged in paragraph 3 of the amended petition, and denies the remainder of said paragraph.

4. Denies that the respondent erred as alleged in paragraph 4 of the amended petition.

5. (1). Admits the allegations contained in subparagraph (1) of paragraph 5 of the amended petition.

[fol. 18] 5. (2), (3) and (4). Denies the allegations contained in subparagraphs (2), (3) and (4) of paragraph 5 of the amended petition.

5. (5), (6), (7) and (8). Admits the allegations contained in subparagraphs (5), (6), (7) and (8) of paragraph 5 of the amended petition.

5. (9), (10), (11) and (12). Denies the allegations contained in subparagraphs (9), (10), (11) and (12) of paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, respondent prays that the Board redetermine the deficiency herein to be the amount determined by the

Commissioner, viz.: $30,024.60 in respect of income taxes for the taxable year 1937.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: F. R. Shearer, Division Counsel; Henderson A. Melville, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED PETITION OF ESTATE OF CHARLES H. ROBINSON, ET AL., CO-EXECUTORS, IN CASE NO. 102,869—Filed July 27, 1940

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commis- [fol. 19] sioner of Internal Revenue in his notice of deficiency (Bureau Symbol: LGE 90D) dated March 9, 1940, and as a basis of their proceeding allege as follows:

1. That petitioners are the co-executors of the Estate of Charles H. Robinson. The Northwestern National Bank and Trust Company of Minneapolis is a national banking association with offices at Minneapolis, Minnesota. Jessie P. Robinson and Charles J. Robinson are individuals, co-executors of the said estate, and both residents of the City of Minneapolis, State of Minnesota. The return for the period here involved was filed with the Collector of Internal Revenue for the collection district of Minnesota.

2. The notice of deficiency (a copy of which is attached hereto, marked Exhibit "A", and made a part hereof) was mailed to the petitioners on March 9, 1940.

3. The taxes in controversy are income taxes for the calendar year 1937 and in the amount of $1,532.38, alleged deficiency, plus the sum of $230.87 overpayment alleged by petitioners.

4. The determination of tax set forth in the notice of deficiency is based upon the following errors:

(1) The Commissioner erred in determining that there should be disallowed as a deduction the sum of $1,724.00

deducted from gross income on taxpayer's return for the taxable year 1937 as depletion suffered on the mining property owned by taxpayers known as the Pettit Mine, such action of the Commissioner being in violation of Section 23(m), Revenue Act of 1936.

(2) The Commissioner erred in determining that there should be included in taxpayers' gross income for the taxable year 1937 amounts received by taxpayers at various times in the years 1932 to 1936 inclusive, totaling $9,829.14, and being equal to the aggregate of deductions for depletion on the said Pettit Mine taken by the estate on its returns for the taxable years 1932 to 1936 inclusive, such action of the Commissioner being in violation of Section 23(m) and Section 42 of the Revenue Act of 1936.

(3) The Commissioner erred in determining that taxpayers realized in the taxable year 1937 income in the [fol. 20] amount of $9,829.14 by reason of the termination in 1937 of a mining lease on said Pettit Mine without extraction of ore on which advance royalties had been paid and in respect of which depletion had been taken by taxpayer in years prior to 1937, such action of the Commissioner being in violation of Section 22(a) of the Revenue Act of 1936.

(4) The Commissioner erred in determining that there is a deficiency in petitioner's income tax liability for the taxable year 1937.

(5) The Commissioner erred in failing to determine that there was an overpayment by the taxpayers in the amount of $230.87.

(6) The Commissioner erred by making the above specified determinations under the provisions of Article 23(m)-10 of Regulations 94, and corresponding provisions of prior regulations, in violation of Section 22(a), Section 23(m), Section 41 and Section 42 of the Revenue Act of 1936.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(1) Charles H. Robinson died August 16, 1932, a resident of and domiciled in Minneapolis, Minnesota. At the time of his death Charles H. Robinson owned an undivided

one-sixth fee interest in a particular iron ore mine situated in St. Louis County, State of Minnesota, known as the "Pettit" mine.

(2) Since the time of death of the said Charles H. Robinson the property has been administered by the above named executors of the Estate of Charles H. Robinson, petitioners herein.

. . . . . .

(5) At the time of death of the said Charles H. Robinson the said Pettit mine had been leased by the said Charles H. Robinson and the other fee owners to the Republic Steel Company of Youngstown, Ohio, for a period of thirty years, beginning July 1, 1929.

A. Under the terms of this lease the Republic Steel Company was to pay a royalty of forty (40) cents per ton for each ton of ore removed from the said Pettit mine.

[fol. 21] B. The lease provided for the payment of minimum royalties of $20,000.00 per year each year during the first four years of the life of the lease and $40,000.00 per year minimum royalties for the remaining years of the lease, with a proviso that if the said lessee failed to pump out and remove certain water then in the mine, within five years after the lease was entered into, then the minimum royalties were to be $60,000.00 each year during the period that the lessee failed to remove the water from the mine.

C. The lease provided that the lessee was to be entitled to credit for the amount of any and all such minimum royalties paid by it in advance of the removal of ore and was to have a right to have the advance payments applied toward the payment of royalties accruing to the lessor on account of ore mined in excess of the minimum royalty payment, in some subsequent year.

D. The lessee was to have a right to terminate the lease at any time, upon proper notice, except that it was agreed that, at all events, the lease was to remain in full force and effect for seven years from the date of execution.

E. In May, 1933 the lease was amended so as to provide for the payment of $20,000.00 advance royalties per year, for the first five years of the life of the lease instead of the first four years of such life and the lease was further

amended so that it could not be terminated by the lessee for eight years instead of seven, as originally provided.

(6) The Republic Steel Company, lessee, entered into possession of the mine in 1929, and, in accordance with the terms of the lease paid the required minimum royalties until July, 1937. The Estate received the following income and took the following depletion allowances:

Year	Royalty Received	Depletion Claimed
8-16-32 to 12-31-32	$833.33	$413.19
1933	3,333.32	1,176.00
1934	4,166.66	2,065.94
1935	7,500.00	2,646.01
1936	10,000.00	3,528.00
1937	5,000.00	1,724.00

[fol. 22] The total royalties received were $30,833.31. The total depletion taken was $11,553.14. Depletion was taken on the so-called "cost basis."

(7) In 1937 the Republic Steel Company voluntarily terminated the lease according to the terms thereof, effective July 1, 1937, thereby releasing all interest which it had in the mining property including the right to remove ore paid for my the minimum royalties.

(8) No ore had been removed from the mine by the said lessee, Republic Steel Company, prior to the time of cancellation.

* * * * * * *

Wherefore, petitioners pray that this Board may hear the proceeding and declare that the Commissioner erred in each of the particulars specified in petitioners' assignments of error herein, and that there is no tax deficiency due from the petitioners to the United States Government; and petitioners further pray that this Board determine an overpayment of taxpayers' 1937 income tax in the amount of $230.87.

James E. O'Brien, Counsel, 808 First National-Soo Line Bldg., Minneapolis, Minnesota.

Dated July 20th, 1940.

STATE OF MINNESOTA,
County of Hennepin—ss.:

Jessie P. Robinson and Charles J. Robinson, being duly sworn, say that they are two of the co-executors of the Estate of Charles H. Robinson, above named, and that they have authority to act herein for the said estate and for the co-executors thereof; that they have read the foregoing petition and are familiar with the statements contained therein and that the statements contained therein are true except those stated to be on information and belief, and that those they believe to be true.

Jessie P. Robinson, Charles J. Robinson.

[fol. 23] Subscribed and sworn to before me this 20th day of July, 1940. S. T. Persen, Notary Public, Henn. Co., Minn. My Commission expires April 24, 1942. (Seal.)

Duly sworn to by C. E. Drake and S. H. Rogers. Jurat omitted in printing.

[fol. 24] EXHIBIT "A" TO AMENDED PETITION

Treasury Department
Internal Revenue Service
St. Paul, Minnesota

Office of Internal Revenue Agent in Charge St. Paul Division, 800 Post Office Bldg.

March 9, 1940.

Estate of Charles H. Robinson, Northwestern National Bank and Trust Company, Co-executor, Minneapolis, Minnesota.

Collection District: Minnesota

SIRS:

You are advised that the determination of your income tax liability for the taxable year 1937 discloses a deficiency of $1,532.38 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the internal revenue agent in charge, St. Paul, Minnesota for the attention of LGE-90D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, By C. W. Rink, Internal Revenue Agent in Charge.

Enclosures: Statement Form of waiver. LGE/mer.

[fol. 25] STATEMENT

Estate of Charles H. Robinson, Northwestern National Bank and Trust Company, Co-executor, Minneapolis, Minnesota

Tax Liability for Taxable Year Ended December 31, 1937

	Liability	Assessed	Deficiency
Income tax	$2,592.04	$1,059.66	$1,532.38

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 19, 1939; to your protest dated July 6, 1939; and to statements made at conferences held on September 27, 1939 and November 28, 1939.

A copy of this letter and statement has been mailed to James E. O'Brien, 808 First National-Soo Line Building, Minneapolis, Minnesota, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income

Net income as disclosed by return		$14,163.86
Unallowable deductions and additional income:		
(a) To disallow depletion on Pettit Mine	$1,724.00	
(b) Amount included in income equal to depletion deductions allowed in years prior to 1937	9,829.14	11,553.14
		25,717.00
Nontaxable income and additional deductions:		
(c) To adjust depletion on Corsica Mine		1,993.01
Net income adjusted		23,723.99

Explanation of Adjustments

(a) Under conditions known to exist during the year 1937, it is held that no depletion is allowable for that year as the result of the receipt by you of advance or minimum royalties under the provisions of the lease agreement with the Republic Steel Company relating to the Pettit Mine.

(b) For the taxable years 1932 to 1936, inclusive, you claimed and were allowed depletion aggregating $9,829.14 in respect of minimum or advance royalties under the lease agreement with the Republic Steel Company relating to the [fol. 26] Pettit Mine, pursuant to the provisions of the Regulations then in force corresponding to Article 23(m)-10 of Regulations 94. Such regulations provided that if for any reason the mineral lease expires or terminates or is abandoned before the mineral which has been paid for in advance has been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned. The lessee failed to remove any ore from the mine, and during the year 1937 elected to terminate the above-mentioned lease agreement and abandoned the right to extract and remove the mineral which had been paid for by minimum or advance

royalties paid in prior years. It is held that in accordance with the provisions of Article 23(m)-10 of Regulations 94, and corresponding provisions of prior regulations, you derived income in the year 1937 equal to the amounts so deducted and allowed as depletion in prior years.

(c) To adjust depletion on Corsica Mine to the amount allowable as shown below:

199,642 tons at $.06177	$12,331.87
Depletion claimed	10,338.86
Additional depletion allowable	1,993.01

Computation of Tax

Net income adjusted	$23,723.99
Less: Personal exemption	1,000.00
Balance (surtax net income)	22,723.99
Net income subject to normal tax	22,723.99
Normal tax at 4% on $22,723.99	908.96
Surtax on $22,723.99	1,683.08
Total tax	2,592.04
Income tax assessed:	
Original, Account No. 185887	1,059.66
Deficiency of income tax	1,532.38

[fol. 27] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER OF COMMISSIONER OF INTERNAL REVENUE TO AMENDED PETITION OF ESTATE OF CHARLES H. ROBINSON, ET AL., CO-EXECUTORS, IN CASE NO. 102,869—Received and Filed August 29, 1940

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1937, as alleged in paragraph 3 of the amended petition, and denies the remainder of said paragraph.

4. Denies that the respondent erred as alleged in paragraph 4 of the amended petition.

5. (1) and (2). Admits the allegations contained in subparagraphs (1) and (2) of paragraph 5 of the amended petition.

5. (3) and (4). Denies the allegations contained in subparagraphs (3) and (4) of paragraph 5 of the amended petition.

5. (5), (6), (7) and (8). Admits the allegations contained in subparagraphs (5), (6), (7) and (8) of paragraph 5 of the amended petition.

5. (9), (10), (11) and (12). Denies the allegations contained in subparagraphs (9), (10), (11) and (12) of paragraph 5 of the amended petition.

[fol. 28] Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, respondent prays that the Board redetermine the deficiency herein to be the amount determined by the Commissioner, viz.: $1,532.38 in respect of income taxes for the taxable year 1937.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: F. R. Shearer, Division Counsel; Henderson A. Melville, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION OF BERNICE B. DALRYMPLE IN CASE NO. 106,705—Filed March 20, 1941

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his Notice of Deficiency dated December 30, 1940, and as a basis of the proceeding alleges as follows:

1. That petitioner is an individual, resident and domiciled in the City of Minneapolis, Minnesota, with her office at 953 Northwestern Bank Building. That petitioner is the transferee of all of the assets of the Estate of Irene B. Robinson Cirkler, Deceased. The return for the period herein involved was filed with the Collector for the Collection District of Minnesota. The return involved is the [fol. 29] return for Irene B. Robinson Cirkler, Deceased, an individual, resident and domiciled in Hollywood, State of California, covering the period from January 1, 1937, to October 20, 1937, the date of her death.

2. The Notice of Deficiency (a copy of which is attached hereto, marked Exhibit A, and made a part hereof) was mailed to the petitioner on December 30, 1940.

3. The taxes in controversy are income taxes for that part of the calendar year 1937 prior to the death of Irene B. Robinson Cirkler, deceased taxpayer, and in the amount of $5,412.47, alleged deficiency.

4. The determination of tax set forth in said Notice of Deficiency is based on the following errors:

(1) The Commissioner erred in determining that there should be disallowed as a deduction the sum of $5,371.44 deducted from gross income on decedent's return for the year 1937 as depletion suffered on the mining property owned by decedent known as the Pettit Mine, such action of the Commissioner being in violation of Section 23(m), Revenue Act of 1936.

(2) The Commissioner erred in determining that there should be included in the decedent's gross income for the taxable year 1937 amounts received by decedent at various times in the years 1929 to 1936, inclusive, totaling $18,180.26, and being equal to the aggregate deductions for depletion on the said Pettit Mine taken by decedent on her returns for the taxable years 1929 to 1936, inclusive, such action of the Commissioner being in violation of Section 23(m) and Section 42 of the Revenue Act of 1936.

(3) The Commissioner erred in determining that decedent realized in the year 1937 income in the amount of

$18,180.26 by reason of the termination in 1937 of a mining lease on said Pettit Mine without extraction of ore on which advance royalties had been paid and in respect of which depletion had been taken by decedent in years prior to 1937, such action of the Commissioner being in violation of Section 22(a) of the Revenue Act of 1936.

(4) The Commissioner erred in determining that there is a deficiency in decedent's income tax liability for the year 1937.

[fol. 30] (5) The Commissioner erred by making the above specified determinations under the provisions of Article 23(m)-10 of Regulations 94, and corresponding provisions of prior regulations, in violation of Section 22(a), Section 23(m), Section 41 and Section 42 of the Revenue Act of 1936.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) Irene B. Robinson Cirkler died on October 20, 1937. At the time of her death she was a resident of and domiciled in the City of Hollywood, State of California. During her lifetime the said Irene B. Robinson Cirkler owned an undivided one-sixth fee interest in a particular iron ore mine situated in St. Louis County, Minnesota, known as the "Pettit" Mine. The said decedent had acquired her interest in the property prior to March 1, 1913, and had continued to hold the property until the time of her death.

. . . . . .

(5) In 1929 decedent herein, together with the other fee owners, leased the said Pettit Mine to the Republic Steel Company of Youngstown, Ohio, for a period of thirty (30) years, said lease commencing to run July 1, 1929. Decedent was entitled to a one-sixth share in the royalties received from the said lease.

A. Under the terms of this lease the Republic Steel Company was to pay a royalty of forty (40) cents per ton for each ton of ore removed from the said Pettit Mine.

B. The lease provided for the payment of minimum royalties of $20,000.00 per year each year during the first four years of the life of the lease and $40,000.00 per year minimum royalties for the remaining years of the lease,

with a proviso that if the said lessee failed to pump out and remove certain water then in the mine, within five years after the lease was entered into, then the minimum royalties were to be $60,000.00 each year during the period that the lessee failed to remove the water from the mine.

C. The lease provided that the lessee was to be entitled to credit for the amount of any and all such minimum royalties paid by it in advance of the removal of ore and was to have a right to have the advance payments applied to-[fol. 31] ward the payment of royalties accruing to the lessor on account of ore mined in excess of the minimum royalty payment, in some subsequent year.

D. The lessee was to have a right to terminate the lease at any time, upon proper notice, except that it was agreed that, at all events, the lease was to remain in full force and effect for seven years from the date of execution.

E. In May, 1933, the lease was amended so as to provide for the payment of $20,000.00 advance royalties per year for the first five years of the life of the lease instead of the first four years of such life, and the lease was further amended so that it could not be terminated by the lessee for eight years instead of seven as originally provided.

(6) The Republic Steel Company, lessee, entered into possession of the mine in July, 1929, and paid royalties in accordance with the terms of the lease above described. Decedent's share of the royalties paid and the depletion which she took against said royalties were as follows:

Year	Royalty Received	Depletion Claimed
1929	$833.33	$413.19
1930	3,333.33	1,652.75
1931	3,333.33	1,652.75
1932	3,333.33	1,652.75
1933	3,333.33	1,652.75
1934	5,000.00	2,479.13
1935	7,500.00	3,718.69
1936	10,000.00	4,958.25
1937	10,833.33	5,371.44

Total royalties received by said decedent for the nine years were $47,499.98. Total depletion taken for the nine years

amounted to $23,551.70. Depletion was taken on the "cost" basis.

(7) In 1937 the Republic Steel Company voluntarily terminated the lease according to the terms thereof, effective July 1, 1937, thereby releasing all interest which it had in the mining property including the right to remove ore paid for by the minimum royalties.

[fol. 32] (8) No ore had been removed from the mine by the said lessee, Republic Steel Company, prior to the time of cancellation.

. . . . . .

(14) That petitioner is the transferee of all of the assets of the Estate of Irene B. Robinson Cirkler, Deceased.

Wherefore, Petitioner prays that this Board may hear the proceeding and declare that the Commissioner erred in each of the particulars specified in petitioner's assignments of error herein, and that there is no tax deficiency due from petitioner to the United States Government.

James E. O'Brien, Kimball B. DeVoy, Attorneys for Petitioner, 808 First National-Soo Line Building, Minneapolis, Minnesota.

Dated March 15th, 1941.

Duly sworn to by Bernice B. Dalrymple. Jurat omitted in printing.

[fol. 33] EXHIBIT "A" TO PETITION

Treasury Department
Internal Revenue Service
St. Paul, Minnesota

Dec. 30, 1940.

Office of Internal Revenue Agent in Charge St. Paul Division 800 Post Office Building

Bernice B. Dalrymple,
953 Northwestern Bank Building,
Minneapolis, Minnesota.

Collection District:
Minnesota.

MADAM:

You are advised that the determination of the income tax liability of the estate of Irene B. Robinson Cirkler, Deceased, Minneapolis, Minnesota, for the taxable year ended December 31, 1937, discloses a deficiency of $5,412.47, as shown in the statement attached.

The amount of the deficiency stated, plus interest as provided by law, constituting your liability as transferee of the assets of said estate of Irene B. Robinson Cirkler, Deceased, will be assessed against you.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the internal revenue agent in charge, St. Paul Minnesota, for the attention of LGE-90D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period termi- [fol. 34] nates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner. By, C. W. Rink, Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
LGE/mrr.

Bernice B. Dalrymple, Transferee

STATEMENT

Estate of Irene B. Robinson Cirkler, Deceased, Transferor,

953 Northwestern Bank Building,

Minneapolis, Minnesota.

Tax Liability for the Taxable Year Ended

December 31, 1937

Bernice B. Dalrymple,

953 Northwestern Bank Building,

Minneapolis, Minnesota

	Liability	Assessed	Deficiency
Income tax	$7,095.08	$1,682.61	$5,412.47

The records of this office indicate that assets of the above-named decedent's estate have been transferred to you.

The above-stated amount represents your liability as a transferee of assets of the estate of Irene B. Robinson Cirkler, deceased, 953 Northwestern Bank Building, for a deficiency in income tax due from the estate of Irene B. Robinson Cirkler, deceased, for the taxable year ended December 31, 1937.

Adjustments to Net Income

Net income as disclosed by return		$18,830.71
Unallowable deductions and additional income:		
(a) Depletion disallowed on Pettit Mine	$5,371.44	
(b) Amount included in income equal to depletion deductions allowed in years prior to 1937	18,180.26	23,551.70
Net income adjusted		42,382.41

[fol. 35] Explanation of Adjustments

(a) Under conditions known to exist during the year 1937, it is held that no depletion is allowable for that year as the result of the receipt by Irene B. Robinson Cirkler, deceased, of advance or minimum royalties under the provisions of the lease agreement with the Republic Steel Company relating to the Pettit Mine.

(b) For the taxable years 1929 to 1936, inclusive, Irene B. Robinson Cirkler, deceased, was allowed depletion aggregating $18,190.26 in respect of minimum or advance royalties under the lease agreement with the Republic Steel Company relating to the Pettit Mine, pursuant to the provisions of the Regulations then in force corresponding to Article 23(m)-10 of Regulations 94. Such regulations provided that if for any reason the mineral lease expires or terminates or is abandoned before the mineral which has been paid for in advance has been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned. The lessee failed to remove any ore from the mine, and during the year 1937 elected to terminate the above-mentioned lease agreement and abandoned the right to extract and remove the mineral which had been paid for by minimum or advance royalties paid in prior years. It is held that in accordance with the provisions of Article 23(m)10 of Regulations 94, and corresponding provisions of prior regulations, Irene B. Robinson Cirkler, deceased, derived income in the year 1937 equal to the amounts so deducted and allowed as depletion in prior years.

Computation of Tax

Net income adjusted	$42,382.41
Less: Personal exemption	1,000.00
Balance (surtax net income)	41,382.41
Less: Earned income credit (10% of $3,000.00)	300.00
Net income subject to normal tax	41,082.41

Normal tax at 4% on $41,082.41	1,643.30
Surtax on $41,382.41	5,451.78
Total tax	7,095.08
Income tax assessed:	
Original, Account No. 807,171	1,682.61
Deficiency of income tax	5,412.47

[fol. 36] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER OF COMMISSIONER OF INTERNAL REVENUE IN CASE No. 106705—Received and Filed April 22, 1941

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is denied that Irene B. Robinson Cirkler, Deceased, was a resident of and domiciled in Hollywood, California.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for that part of the calendar year 1937 prior to the death of Irene B. Robinson Cirkler; denies the remaining allegations contained in paragraph 3 of the petition.

4. (1) to (5), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (5), inclusive, of paragraph 4 of the petition.

5. (1). Admits that Irene B. Robinson Cirkler died on October 20, 1937; admits that during her lifetime she owned an undivided fee interest in an iron ore mine situated in St. Louis County, Minnesota, known as the "Pettit" Mine; denies the remaining allegations contained in subparagraph (1) of paragraph 5 of the petition.

5. (2), (3) and (4). Denies the allegations contained in subparagraphs (2), (3) and (4) of paragraph 5 of the petition.

5. (5). Admits that in 1929 the decedent, together with the other fee owners, leased the said "Pettit" Mine to the Republic Steel Company of Youngstown, Ohio; admits that [fol. 37] the decedent was entitled to a share in the royalties received from said lease; denies the remaining allegations contained in subparagraph (5) of paragraph 5 of the petition.

5. (5) A. Admits that under the terms of said lease the Republic Steel Company was required to pay royalties; denies the remaining allegations contained in subparagraph (5) A of paragraph 5 of the petition.

5. (5) B to E, inclusive. Denies the allegations contained in sub-paragraphs (5) B to (5) E, inclusive, of paragraph 5 of the petition.

5. (6) Admits that the Republic Steel Company entered into possession of the mine in 1929; admits that it paid royalties under its lease, of which the decedent received a share; admits that the decedent claimed and was allowed depletion deductions in her Federal income tax returns for the years 1929 to 1936, inclusive, in respect of said royalties; denies the remaining allegations contained in subparagraph (6) of paragraph 5 of the petition.

5. (7) and (8). Admits the allegations contained in sub-paragraphs (7) and (8) of paragraph 5 of the petition.

5. (9) to (13), inclusive. Denies the allegations contained in subparagraphs (9) to (13), inclusive, of paragraph 5 of the petition.

5. (14). Admits the allegations contained in subparagraph (14) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

7. The facts upon which the respondent relies to sustain the determination that the petitioner is liable as transferee of the assets of the Estate of Irene B. Robinson Cirkler, Deceased, are as follows:

(1) The deficiency of $5,412.47 in Federal income tax and interest thereon determined to be due from the Estate of Irene B. Robinson Cirkler, Deceased, John S. Dalrymple,

Executor, and asserted herein against the petitioner as transferee, has not been paid.

[fol. 38] (2) The petitioner was a legatee under the last will and testament of Irene B. Robinson Cirkler, Deceased.

(3) As such legatee, and subsequent to the accrual of the tax liability in question, the petitioner received without consideration in the distribution of the Estate of Irene B. Robinson Cirkler, Deceased, assets of a value in excess of the said tax liability, together with interest thereon.

(4) As a result of said distribution of the assets to the petitioner, the Estate of Irene B. Robinson Cirkler, Deceased, became and ever since has been insolvent and without any assets with which to satisfy the payment of the taxes in controversy.

Wherefore, respondent prays that the Board redetermine the petitioner's liability herein to be the amount determined by the Commissioner, viz.: $5,412.47, plus interest as provided by law.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of counsel: F. R. Shearer, Division Counsel; S. U. Hiken, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

REPLY OF BERNICE B. DALRYMPLE TO ANSWER OF COMMISSIONER OF INTERNAL REVENUE IN CASE NO. 106705—Received and Filed May 2, 1941

Now comes the petitioner by her attorneys, James E. O'Brien and Kimball B. DeVoy, and for her reply to the [fol. 39] answer of the Commissioner filed herein admits as follows:

1. Admits each and every allegation contained in paragraphs 7(1), 7(2), 7(3) and 7(4) of said answer.

Wherefore, Petitioner prays that the Board redetermine her liability herein as prayed for in her petition.

James E. O'Brien, Kimball B. DeVoy, Attorneys for Petitioner, 808 First National-Soo Line Building, Minneapolis, Minnesota.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102870

[Titles omitted]

STIPULATION OF FACTS—Filed at Hearing June 16, 1941

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the facts hereinafter set forth shall be taken as true, provided, however, (1) that each of the parties hereto reserves the right [fol. 40] to object to the admissibility in evidence of any of such facts, on the ground of irrelevancy and immateriality, and (2) that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true.

A. The following facts apply to all of these proceedings:

1. Prior to 1929 Bessie P. Douglas, Adeline R. Morse, Charles H. Robinson and Irene B. Robinson Cirkler (sometimes hereinafter referred to as the Lessors) owned an iron ore mine situated in St. Louis County, Minnesota, known as the "Pettit" mine. Bessie P. Douglas owned an undivided one-half interest in the mine and each of the other Lessors owned an undivided one-sixth interest therein.

2. In 1929 the Lessors leased said mine to the Republic Steel Company of Youngstown, Ohio (hereinafter referred to as the Lessee), for a term of thirty (30) years commencing July 1, 1929. A copy of said lease and a copy of the only amendment thereto (hereinafter referred to as the lease) are attached hereto, marked Exhibit A, and made a part hereof the same as if fully set forth herein.

3. Pursuant to the provisions of the lease, and in accordance with its terms, the Lessee cancelled and terminated the lease in 1937, effective as of July 1 of that year.

4. No ore was removed from the Pettit mine at any time during the existence of the lease. Prior to the execution of the lease some iron ore had been removed.

B. The following facts, to the extent that they are relevant and material, apply to the case of Bessie P. Douglas, Docket No. 102870:

5. The petitioner, a resident of Minneapolis, Minnesota, filed her Federal income tax return for the year involved herein with the Collector of Internal Revenue for the District of Minnesota, at St. Paul, Minnesota.

6. In accordance with the provisions of the lease, the Lessee paid to the petitioner, as one of the Lessors of the Pettit mine, the following advance or minimum royalties [fol. 41] on mineral not removed, for the year 1929 to 1936, inclusive:

Year	Advance Royalties paid to and received by petitioner
1929	$2,500.00
1930	10,000.00
1931	10,000.00
1932	10,000.00
1933	10,000.00
1934	12,500.00
1935	22,500.00
1936	30,000.00

7. For said years the petitioner claimed depletion deductions in her Federal income tax returns on account of said advance royalties, which were allowed by the respondent as deductions, as follows:

Year	Depletion Deductions Claimed by Petitioner and Allowed by Respondent
1929	$1,239.51
1930	4,958.05
1931	4,958.05
1932	4,958.05
1933	4,958.05
1934	6,197.56
1935	11,155.61
1936	14,874.15

These depletion deductions were taken on the cost basis.

8. No income was reported by the petitioner in her Federal income tax return for 1937 on account of the depletion deductions claimed by and allowed to the petitioner for prior years on advance royalties from the Pettit mine.

9. For each of the taxable years 1929 to 1936, inclusive, the petitioner's net income and her Federal income

tax liability as finally adjusted and assessed by the respondent were as follows:

Year	Net Income	Income Tax Liability
1929	$105,823.88	$14,778.78
1930	41,892.00	3,131.04
1931	31,257.44	1,666.33
1932	25,390.96	2,099.69
1933	(13,947.51)*	None
1934	3,160.10	None
1935	15,226.09	672.14
1936	19,801.68	1,597.90

* Net loss.

[fol. 42] 10. In the computation of her income tax liability for 1934 the petitioner claimed and was allowed a dividend received credit of $5,894.05 and an earned income credit of $300.00.

11. If petitioner had not taken any deductions for depletion with respect to royalties received from the Pettit mine in the taxable years 1929 to 1936, inclusive, her net income and her income tax liability for each of said years would have been as follows:

Year	Net Income	Income Tax Liability
1929	$107,063.39	$15,076.26
1930	46,850.05	3,952.83
1931	35,471.79	2,248.92
1932	29,605.30	2,910.38
1933	(8,989.46)*	None
1934	8,428.03	295.04
1935	25,028.66	2,216.03
1936	32,444.71	4,169.93

* Net loss.

12. The petitioner concedes the correctness of the following adjustments which are set forth in the statement attached to the deficiency notice from which the appeal herein was taken;

"Unallowable deductions and additional income:

"(a) Adjustment of depletion Corsica Mine	$4,031.14
"(b) Depletion disallowed on Pettit Mine	7,437.08
"(d) Cost of preparation of return	125.00"
Total	$11,593.22

* * * * * * *

D. The following facts, to the extent that they are relevant and material, apply to the case of Estate of Charles H. Robinson, Northwestern National Bank and Trust Company of Minneapolis, Jessie P. Robinson and Charles J. Robinson, Co-Executors, Docket No. 102,869:

20. Charles H. Robinson died August 16, 1932. His estate (hereinafter referred to as the petition) is being and at all times since his death has been administered by the Co-Executors thereof, who filed a Federal income tax [fol. 43] return for the period involved herein with the Collector of Internal Revenue for the District of Minnesota, at St. Paul, Minnesota.

21. In accordance with the provisions of the lease, the Lessee paid to the petitioner, as one of the Lessors by succession of the Pettit mine, the following advance or minimum royalties on mineral not removed, for the period in 1932 following Charles H. Robinson's death and for the years 1933 to 1936, inclusive:

Year	Advance Royalties Paid to and Received by Petitioner
Aug. 16 to Dec. 31, 1932	$ 833.33
1933	3,333.32
1934	4,166.66
1935	7,500.00
1936	10,000.00

22. The petitioner did not file a Federal income tax return for the taxable year 1932 covering the period from August 16 to December 31, inclusive. Its taxable net income for said period, after taking a depletion deduction of $413.19 on account of said advance royalties, was $620.87 and it was entitled to a personal exemption credit of $1,000. Said depletion deduction of $413.19 was entered in petitioner's books for said period, and was allowed by the re-

spondent in his examination of the petitioner's Federal income tax liability for said period.

23. For the years 1933 to 1936, inclusive, the petitioner claimed depletion deductions in its Federal income tax returns on account of advance royalties on the Pettit mine, which were allowed as deductions by the respondent, as follows:

Year	Depletion Deductions Claimed by Petitioner and Allowed by Respondent
1933	$1,176.00
1934	2,065.94
1935	2,646.01
1936	3,528.00

These depletion deductions were taken on the cost basis.

24. No income was reported by the petitioner in its Federal income tax return for 1937 on account of the deple-
[fol. 44] tion deductions claimed by and allowed to the petitioner for prior years on advance royalties from the Pettit mine.

25. For the period August 16 to December 31, 1932, and for each of the taxable years 1933 to 1936, inclusive, the petitioner's net income and its Federal income tax liability as adjusted and assessed by the respondent were as follows:

Year	Net Income	Income Tax Liability
Aug. 16 to Dec. 31, 1932	$ 620.87	None
1933	1,934.68	$ 37.35
1934	3,086.11	83.06
1935	9,732.88	572.68
1936	8,589.11	463.02

26. If petitioner had not taken any deductions for depletion with respect to royalties received from the Pettit mine for the period August 16 to December 31, 1932, and for the taxable years 1933 to 1936, inclusive, its net income and its income tax liability for each of said years would have been as follows:

Year	Net Income	Income Tax Liability
Aug. 16 to Dec. 31, 1932	$ 1,034.06	$ 1.36
1933	3,110.68	84.39
1934	5,152.05	171.78
1935	12,378.89	851.07
1936	12,117.11	822.88

27. The parties hereto concede the correctness of the following adjustments which are set forth in the statement attached to the deficiency notice from which the appeal herein was taken:

"Unallowable deductions and additional income:

"(a) To disallow depletion on Pettit Mine $1,724.00

"Nontaxable income and additional deductions:

"(c) To adjust depletion on Corsica Mine 1,993.01"

E. The following facts, to the extent that they are relevant and material, apply to the case of Bernice B. Dalrymple, Docket No. 106,705:

28. The petitioner, a resident of Minneapolis, Minnesota, is the transferee of the assets of the Estate of Irene B. Robinson Cirkler, deceased. Irene B. Robinson Cirkler [fol. 45] (hereinafter referred to as the decedent) was, prior to her death on October 20, 1937, a resident of Hollywood, California. The decedent's Federal income tax return for the period involved herein was filed with the Collector of Internal Revenue for the District of Minnesota, at St. Paul, Minnesota.

29. In accordance with the provisions of the lease, the Lessee paid to the decedent, as one of the Lessors of the Pettit Mine, the following advance or minimum royalties on mineral not removed, for the years 1929 to 1936, inclusive:

Year	Advance Royalties Paid to and Received by Decedent
1929	$ 833.33
1930	3,333.33
1931	3,333.33
1932	3,333.33
1933	3,333.33
1934	5,000.00
1935	7,500.00
1936	10,000.00

30. For said years the decedent claimed depletion deductions in her Federal income tax returns on account of

said advance royalties, which were allowed by the respondent as deductions, as follows:

Year	Depletion Deductions Claimed by Decedent and Allowed by Respondent
1929	$ 413.19
1930	1,652.75
1931	1,652.75
1932	1,652.75
1933	1,652.75
1934	2,479.13
1935	3,718.69
1936	4,958.25

These depletion deductions were taken on the cost basis.

31. No income was reported by the decedent in her Federal income tax return for 1937 following the termination of the lease on account of the depletion deductions claimed by and allowed to the decedent for prior years on advance royalties from the Pettit mine.

32. For each of the taxable years 1929 to 1936, inclusive, the decedent's net income and her Federal income tax [fol. 46] liability as finally adjusted and assessed by the respondent were as follows:

Year	Net Income	Income Tax Liability
1929	$43,789.21	$3,606.51
1930	17,601.06	699.96
1931	15,761.59	555.19
1932	14,991.60	1,139.00
1933	1,591.03	23.64
1934	2,087.46	35.15
1935	5,254.50	168.36
1936	11,651.80	759.70

33. If decedent had not taken any deductions for depletion with respect to royalties received from the Pettit mine in the taxable years 1929 to 1936, inclusive, her net income and her income tax liability for each of said years would have been as follows:

Year	Net Income	Income Tax Liability
1929	$44,202.40	$3,670.52
1930	19,253.81	844.72
1931	17,414.34	685.03

Year	Net Income	Income Tax Liability
1932	16,644.35	1,343.77
1933	3,243.78	89.75
1934	4,566.59	130.66
1935	8,973.19	485.59
1936	16,610.05	1,357.30

34. The petitioner concedes the correctness of the following adjustment to the decedent's taxable net income which is set forth in the statement attached to the deficiency notice from which the appeal herein was taken:

"Unallowable deductions and additional income:

(a) Depletion disallowed on Pettit Mine . $5,371.44"

James E. O'Brien, Kimball B. DeVoy, Counsel for Petitioner, 808 First National-Soo Line Building, Minneapolis, Minnesota. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

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* * * * * * *

[fol. 47] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

Docket Nos. 120,869, 120,870, 120,871 & 106,705

EXCERPT FROM TRANSCRIPT OF HEARING—June 16, 1941

* * * * * * *

Mr. DeVoy: Well, one additional stipulation and fact that it was agreed between Counsel for the respondent and myself that we would like to have written into the record.

The Member: That may be done.

Mr. DeVoy: Do you want this subject to your right to object on the grounds of immateriality?

Mr. Hiken: No, it may be stipulated as a fact.

Mr. DeVoy: It is stipulated as an additional fact that for each of the taxable years, 1925 to 1937, inclusive, Bessie P. Douglas, Adeline R. Morse, and Irene B. Robinson, for each of the taxable years, 1932 to 1937, inclusive, and the Estate of Charles H. Robinson reported their income and claimed their deductions on a cash basis.

The Member: Let the record show that stipulation.

* * * * * * *

BEFORE UNITED STATES BOARD OF TAX APPEALS

Estate of CHARLES H. ROBINSON, Northwestern National Bank and Trust Company of Minneapolis, Jessie P. Robinson and Charles J. Robinson, Co-executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

[fol. 48] Estate of ADELINE R. MORSE, Deceased, John S. Dalrymple, Executor, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 102869, 102870, 102871, 106705. Promulgated April 14, 1942

In computing the net income of the taxpayers for 1937 the respondent included in gross income the amount of the depletion deductions taken and allowed in prior years with respect to minimum royalties received in such years under a mineral lease which was terminated in 1937 by the lessee without any ore having been extracted. Held, that the respondent's action was correct in the case of each of the taxpayers, except that in the case of Bessie P. Douglas the amount so included is to be reduced to the extent that it represented a deduction which did not effect an offset of taxable income for the year in which taken and allowed.

Kimball B. DeVoy, Esq., for the petitioners.

S. U. Hiken, Esq., for the respondent.

OPINION

Turner: The Commissioner determined deficiencies in income tax as follows:

	Docket No.	Year	Deficiency
Estate of Charles H. Robinson	102869	1937	$1,532.38
Bessie P. Douglas	102870	1937	30,024.60
Estate of Adeline R. Morse	102871	1937	4,426.63
		1938	297.02

The Commissioner also determined a deficiency of $5,412.47 in the income tax of Irene B. Robinson Cirkler for the period January 1 to October 20, 1937, the date of her death, and proposed to assess said amount plus interest against Bernice B. Dalrymple, petitioner in Docket No. 106705, as a transferee of assets of the estate of Irene B. Robinson Cirkler, deceased.

[fol. 49] The issues presented by the pleadings are (1) whether the owners of an iron ore property are entitled to a deduction for depletion in 1937 with respect to minimum royalties received in that year, the lease under which the royalties were paid having been terminated in that year without any ore having been removed from the property during the life of the lease, (2) whether in determining taxable income for 1937 there is to be included the amounts of the depletion deductions taken by said owners in prior years in respect to the above lease, and, if said amounts of depletion are to be included in taxable income for 1937, whether they are first to be reduced by the portions thereof as to which no tax benefit was obtained in the years in which deducted, and (3) in the case of the estate of Adeline R. Morse, deceased, whether there is to be allowed a deduction for depletion taken in 1938 with respect to royalties received in that year from the above mentioned lease. The petitioners have conceded the correctness of respondent's disallowance of the deductions involved in issues (1) and (3), thus leaving for determination only the issue presented in (2).

With the exception of the facts relating to the liability of Bernice B. Dalrymple as transferee, all of which were alleged and admitted in the pleadings, the proceedings were submitted on stipulation of facts, which we adopt herein as part of our findings of fact. Such of the stipu-

lated facts and of those shown by the pleadings as we deem necessary for a discussion of the issue here involved are set out below.

The income tax returns of the estate of Charles H. Robinson, Bessie P. Douglas, and Irene B. Robinson Cirkler for the year 1937 or the period here involved and the returns for 1937 and 1938 of Adeline R. Morse were filed with the collector of internal revenue for the district of Minnesota.

On July 1, 1929, as well as prior thereto, the four petitioners or their predecessors in title were owners of an iron mine situated in the State of Minnesota, known as the Pettit Mine, from which some iron ore had been removed. Bessie [fol. 50] P. Douglas owned an undivided one-half interest in the mine and each of the others owned an undivided one-sixth interest.

On July 1, 1929, the four owners leased the mine to the Republic Steel Corporation for a term of 30 years commencing on that date. The lease provided that minimum royalties should be paid annually whether any ore was extracted during the year or not. Minimum royalties paid in advance of extraction of ore were to be applied on ore later mined and shipped. The lease also provided for its cancellation by the lessee, after a specified period, upon three months written notice to the lessors. As of July 1, 1937, the lessee, pursuant to the terms thereof, canceled and terminated the lease without having removed any ore from the mine during the existence of the lease.

From the date of the execution of the lease until its termination the lessee paid the agreed advance royalties to the lessors or their respective successors. Said lessors or successors in filing their income tax returns, which were prepared on the cash basis, reported in their gross incomes for the respective years the royalties received in such years and took deductions for depletion with respect to such royalties. The depletion deductions thus taken were computed on the cost basis and were allowed by the respondent.

In determining the deficiencies herein involved for the year 1937 the respondent, pursuant to the provisions of paragraph (c) of article 23 (m)-10 of Regulations 94, relating to the Revenue Act of 1936, included the following

indicated amounts in the taxable income of the respective taxpayers:

Estate of Charles H. Robinson	$9,829.14
Bessie P. Douglas	53,299.03
Adeline R. Morse	18,180.26
Irene B. Robinson Cirkler	18,180.26

The foregoing amounts represent the total of the depletion deductions claimed by and allowed to said taxpayers for the years prior to and including 1936 with respect to the minimum royalties received by them from the lease on the Pettit Mine.

[fol. 51] The petitioners contend that the respondent's action was erroneous and that in the redetermination of their respective tax liabilities for 1937 there should be eliminated from income the amounts included therein by the respondent on account of depletion deductions taken in prior years. The respondent maintains that his action was correct and proper.

Regulations 94 provides as follows:

Art. 23 (m)-10. Depletion—Adjustments of accounts based on bonus or advanced royalty.—

* * * * * * *

(b) If the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, an amount equal to that part of the basis for depletion allocable to the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.

(c) If for any reason any such mineral lease expires or terminates or is abandoned before the mineral which has

been paid for in advance has been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed; and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned.

In support of their contention the petitioners urge that the application of paragraph (c) of article 23 (m)-10, supra, to their cases imposes upon them a severe penalty without [fol. 52] justification. Taking the case of Bessie P. Douglas as illustrative, they state that by taking depletion deductions totaling $53,299.03 over the eight-year period, 1929 through 1936, she reduced her total income tax liability for that period by $6,923.51; that by including said $53,299.03 in income for 1937 her tax liability for that year is $26,550.65 in excess of what it was without such inclusion or approximately $20,000 more than the reduction effected by reason of the depletion deductions taken in prior years. They insist that such a result is violative of the provisions of section 23 (m) of the Revenue Act of 1936 and similar sections of prior acts allowing deduction of "a reasonable allowance" for depletion since in reality it works a denial to the taxpayers of such allowance. They contend that we should declare paragraph (c) of article 23 (m)-10, as applied to these cases, to be invalid and unauthorized by the act. As alternative procedures to that contained in said paragraph (c), the petitioners suggest the following, both of which it is claimed would protect the collection of taxes and not unjustly burden the taxpayers: (1) Permit matters to stand as they were at the termination of the lease, thereby leaving the lowered cost as the taxpayers' basis for depletion with respect to future leases or production, or (2) provide that as a condition precedent to the allowance in any year of a depletion deduction with respect to royalties received prior to the extraction of mineral, the taxpayer be required to waive the period of limitations for such year and that when the lease is terminated without any extraction of mineral the taxpayers' tax liability be redetermined for the years in which depletion deductions were taken by disallowing such deductions and recomputing the tax liability on the basis of the tax rates in effect for the respective years.

As was pointed out in Grace M. Barnett, 39 B. T. A. 864, arising under the Revenue Act of 1934 and involving paragraph (c) of article 23(m)-10 of Regulations 86, all of the regulations, beginning with Regulations 45, relating to the Revenue Act of 1918, have provided that if depletion is allowed with respect to an advance royalty or bonus and no production occurs during the life of the lease, the lessor must restore to his capital account and report as income in [fol. 53] the year the lease terminates the amount he has been allowed to deduct as depletion in connection with the advance payment, and that that method of allowing and adjusting deductions for depletion had been considered and in effect approved by the Supreme Court in Murphy Oil Co. vs. Burnet, 287 U. S. 299. That method was followed by us in the Barnett case and was applied in Sneed vs. Commissioner, 119 Fed. (2d) 767; rehearing denied, 121 Fed. (2d) 725; certiorari denied, — U. S. — (Nov. 17, 1941), affirming 40 B. T. A. 1136; Crabb vs. Commissioner, 119 Fed. (2d) 772, affirming 41 B. T. A. 686; and Lamont vs. Commissioner, 120 Fed. (2d) 996. These cases are applicable in the instant proceedings and effectively dispose of the main contention of the petitioners.

It is to be observed that the hardship here complained of does not result entirely from the method set forth in the Commissioner's regulation but results in part from the fact that income tax rates were increased over the period 1929 to 1937 and the depletion deductions were taken, generally speaking, in years in which the incomes of the taxpayers were at comparatively low levels. Doubtless, there are cases where the taxpayers had high incomes during the years in which depletion deductions were taken but low incomes for the year in which the deductions are included in income and who would therefore pay less tax under the method contained in the regulations than if the deductions were disallowed for the years in which they were taken. The next case coming before us may present just such a situation. The mere fact that due to his peculiar circumstances one taxpayer may, under the method contained in the regulations, effect a net saving in tax while another taxpayer differently circumstanced may pay more tax than he otherwise would, is not a sufficient reason for holding the method to be invalid in its application here. The uni-

formity required of tax laws is geographic uniformity, not intrinsic uniformity. Bromley vs. McCaughn, 280 U. S. 124.

For the years 1933 and 1934 Bessie P. Douglas took and was allowed depletion deductions of $4,958.05 and $6,197.56, respectively, with respect to the minimum royalties received in those years from the lease on the Pettit Mine. Her net income or loss (after allowance of said deductions) and her income tax liability for said years as finally determined and assessed by respondent were as follows:
[fol. 54]

	Net loss	Net income	Income tax liability
1933	$13,947.51		none
1934		$3,160.10	none

In the computation of her income tax liability for 1934 she claimed and was allowed a dividends received credit of $5,894.05 and an earned income credit of $300.

For the period August 16 to December 31, 1932, the net income of the estate of Charles H. Robinson was $620.87 after allowance of depletion of $413.19 on account of minimum royalties received in that period from the lease on the Pettit Mine. The estate was entitled to a personal exemption credit of $1,000.

With respect to Bessie P. Douglas, it is contended that the respondent erred in including in her 1937 income the amount of $4,958.05 representing the depletion deduction taken by her in 1933. It is also contended that the respondent erroneously included in income $839.90 of the depletion deduction taken by her for 1934. Said amount of $839.90 represents the difference between her net income of $3,160.10 for 1934 and $4,000, the amount above which her income was subject to surtax under the Revenue Act of 1934. With respect to the estate of Charles H. Robinson, it is contended that the respondent erroneously included in 1937 income $379.13 of the depletion allowance for the period August 16 to December 31, 1932. Said amount of $379.13 represents the difference between the net income of $620.87 and $1,000, the amount of the personal exemption credit. It is accordingly urged that the deductions in the amounts of $4,958.05 and $839.90 in the case of Bessie P. Douglas and $379.13 in the case of the estate of Charles H. Robinson produced no "tax benefit" and that the said

amounts should not therefore be included in their 1937 income.

The respondent, relying on Beckridge Corporation, 45 B. T. A. 131, on appeal to the Circuit Court of Appeals for [fol. 55] the Second Circuit, contends that the full amount should be included in 1937 income, regardless of "tax benefit" in the years of deduction. In that case the taxpayer, in 1931, acquired certain real estate which it sold in 1937. During the period of ownership there was actual depreciation of the property, but the taxpayer, operating at a net loss during each of the years, took no deduction for such depreciation either on its books or on its income tax returns. The question presented was whether, for the purpose of computing gain or loss on the sale, the cost basis of the property was to be reduced on account of depreciation occurring during the period of ownership. We there considered the rule of United States vs. Ludey, 274 U. S. 295, and other related cases, which is to the effect that when a taxpayer sells a depreciable property after years of use, the property sold is not the original property but the original property reduced by the depreciation sustained thereon, and that accordingly depreciation must be deducted from the original cost in order to determine the cost of what was disposed of by the sale. In accordance with that rule and the pertinent provisions of the applicable act, we held that the cost basis of the property sold by the Beckridge Corporation was to be reduced by the depreciation allowable with respect to the property during the period of ownership by the corporation.

We fail to see wherein our decision in Beckridge Corporation, supra, is controlling here. In urging the applicability of that decision here the respondent assumes a position contradictory to that taken on the first issue herein. In the instant cases no property was sold nor was any depletion actually sustained. The lessors merely took and were allowed certain deductions for depletion which it was anticipated they would sustain. Upon termination of the lease in 1937, no ore having been extracted, it was found that the anticipated depletion had not been sustained and never would be sustained. The respondent thereupon included in income for 1937 the depletion deductions allowed in prior years, thereby in effect determining that the deductions so allowed were not in fact allowable deductions. Cf. Kennedy Laundry Co., 46 B. T. A. 70.

In support of their claim the petitioners rely on Central Loan & Investment Co., 39 B. T. A. 981; and Amsco-Wire [fol. 56] Products Corporation, 44 B. T. A. 717. In Estate of James N. Collins, 46 B. T. A.—(March 27, 1942), and John V. Dobson, 46 B. T. A.—(March 27, 1942), we had occasion to review the decisions relied on by the petitioners herein and, in the case of John V. Dobson, said:

Where there is recovery in respect of a loss sustained in an earlier year and a deduction of such loss claimed and allowed for the earlier year had effected an offset in taxable income, the amount recovered in the later year should be included in taxable income for the year of recovery, the reason being that even though the subsequent recovery is in the nature of a capital recovery the prior deduction of the amount of the loss from taxable income has for income tax purposes already given the taxpayer a recoupment of said loss out of taxable income and the subsequent recovery, being in the nature of a replacement of taxable income, is equivalent to gain to the taxpayer. National Bank of Commerce of Seattle vs. Commissioner, 115 Fed. (2d) 875, affirming 40 B. T. A. 72. But where the deduction claimed and allowed in the prior year did not effect an offset of taxable income, the amount recovered in a later year does not constitute taxable income for the year of recovery. Estate of James N. Collins, supra.

Applying the rule to the case of Bessie P. Douglas, who had a net loss of $13,947.51 for 1933, it is apparent that the depletion deduction of $4,958.05 taken in that year did not effect an offset in taxable income, since she had a net loss for that year of $8,989.46 aside from the depletion deduction. Accordingly we hold that the respondent erred in including said $4,958.05 in income for 1937.

After taking a depletion deduction of $6,197.56 in 1934, Bessie P. Douglas still had a net income of $3,160.10 for that year; likewise the estate of Charles H. Robinson still had net income of $620.87 for the period August 16 to December 31, 1932, after the allowance of depletion in the amount of $431.19. From this it is clear that the entire amount of said depletion allowances effected offsets in the income of these taxpayers for the taxable periods mentioned and are to be included in income for the year in which the lease was canceled. John V. Dobson, supra; Cen- [fol. 57] tral Loan & Investment Co., supra; National Bank

of Commerce of Seattle, 40 B. T. A. 72; affd., 115 Fed. (2d) 875; and Amsco-Wire Products Corporation, supra.

The respondent's action in including in taxable income for 1937 the depletion deductions taken and allowed in prior years is sustained in all the cases involved in these proceedings except as to $4,958.05 in the case of Bessie P. Douglas.

It is stipulated that Bernice B. Dalrymple is transferee of assets of the estate of Irene B. Robinson Cirkler, deceased, and the pleadings establish the extent to which she may be so held.

Decisions will be entered under Rule 50.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 102,870

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION—May 9, 1942

Pursuant to the opinion of the Board promulgated April 14, 1942, the respondent on April 27, 1942 filed a recomputation of tax and the petitioner on May 7, 1942 filed an agreement to such recomputation. Now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1937 in the amount of $26,977.56.

Enter:

Entered: May 9, 1942.

Bolon B. Turner, Member.

(Seal, U. S. Board of Tax Appeals, 1924.)

[fol. 58] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 102,869

ESTATE OF CHARLES H. ROBINSON, NORTHWESTERN NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, Jessie P. Robinson and Charles J. Robinson, Co-Executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION—May 9, 1942

Pursuant to the opinion of the Board promulgated April 14, 1942, the respondent herein on April 29, 1942 filed a recomputation of tax and the petitioner on May 7, 1942, filed an agreement to such recomputation. Now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1937 in the amount of $1,532.38.

Enter:

Entered: May 9, 1942.

Bolon B. Turner, Member.

(Seal, U. S. Board of Tax Appeals, 1924.)

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 106,705

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION—May 9, 1942

Pursuant to the opinion of the Board promulgated April 14, 1942, the respondent herein on April 29, 1942 filed a recomputation of tax and on May 7, 1942 petitioner filed an agreement to such recomputation. Now, therefore, it is

[fol. 59] Ordered and Decided: That at law and in equity

there is an unpaid liability for income tax in the amount of $5,412.47, together with interest as provided by law, for the period January 1 to October 20, 1937, due from this petitioner as transferee of the assets of Irene B. Robinson Cirkler, deceased.

Enter:

Entered: May 9, 1942.

Bolon B. Turner, Member.

(Seal, U. S. Board of Tax Appeals, 1924.)

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION OF BESSIE P. DOUGLAS IN CASE NO. 102870 FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS—Filed August 3, 1942

To: The Honorable, The Judges Of The United States Circuit Court Of Appeals For the Eighth Circuit:

Bessie P. Douglas, the petitioner in the above entitled matter, by James E. O'Brien and Kimball B. DeVoy, her counsel, hereby files her petition for a review by the United States Ci-cuit Court of Appeals for the Eighth Circuit of the decision by the United States Board of Tax Appeals rendered on May 9, 1940, 46 B. T. A. , No. 125, determining a deficiency in the petitioner's Federal income tax for the calendar year 1937, in the amount of $26,977.56, and respectfully shows:

I.

JURISDICTION

The petitioner, Bessie P. Douglas, at the time of filing this petition, is an individual, a citizen of the United States, and resides at 2424 Park Avenue, Minneapolis, Minnesota. [fol. 60] She filed her Federal Income Tax return for the year 1937, the period here involved, at the office of the Collector of Internal Revenue for the District of Minnesota, in St. Paul, Minnesota, which is located within the juris-

diction of the United States Circuit Court of Appeals for the Eighth Circuit. Subsequent to the decision of the Board, review of which is herein sought, petitioner paid in full the deficiency thereby determined, together with interest thereon as provided by law, to the date of said payment.

II

Nature of the Controversy

The controversy involves the propriety of cumulating income received by a cash-basis taxpayer in each of a series of eight years, adding the accumulated total to the gross income of the ninth year, and assessing the tax thereon at progressive rates for the ninth year.

The facts giving rise to this controversy are substantially as follows:

Prior to 1929 Bessie P. Douglas, Adeline R. Morse, Charles H. Robinson and Irene B. Robinson Cirkler, were the owners of the Pettit iron mine in St. Louis County, Minnesota. Bessie P. Douglas, this petitioner, owned an undivided one-half interest and each of the other owners owned an undivided one-sixth interest. In 1929 these owners leased the mine to the Republic Steel Company for a term of thirty (30) years commencing July 1, 1929.

In each of the years 1929 to 1936, inclusive, Bessie P. Douglas received certain advance or minimum royalties. For each of these years she claimed depletion deductions in her Federal income tax returns on account of said advance royalties. These depletion deductions were taken on the cost basis and were allowed by the respondent as proper deductions.

As of July 1, 1937, pursuant to the provisions of the lease, the Lessee cancelled and terminated the lease. No ore had been removed from the mine at any time during the existence of the lease.

[fol. 61] In her Federal income tax return for 1937, petitioner reported no income by reason of the depletion deductions allowed to her for the years 1929 to 1936, inclusive.

Upon audit of petitioner's return for 1937, the respondent added to the gross income reported therein an amount equal to the aggregate of the deductions for depletion taken by

her on each of her returns for the eight years, 1929 through 1936, and based his determination of the deficiency upon this addition. The respondent made this addition pursuant to Article 23m—10(e) of Regulations 94. The Board held that the Commissioner erred in including the depletion deduction taken by petitioner for the year 1933 in which petitioner sustained a large net loss without the aid of the depletion deduction. Otherwise the Board sustained the action of the Commissioner in adding these amounts to petitioner's income for the year 1937.

Petitioner's position was and is that the inclusion of any of these amounts in the 1937 gross income constitutes an unlawful cumulation into one year of income received by her in a series of years.

III

Petitioner, being aggrieved by the conclusions of law contained in the opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Eighth Circuit.

IV

Assignments of Error

The petitioner assigns as error the following acts of the Board of Tax Appeals:

1. The Board erred in holding as a conclusion of law that it was proper to include in the petitioner's gross income for the year 1937 $839.90 of the depletion deduction taken by her for the year 1934.

2. The Board erred in holding as a conclusion of law that it was proper to include in petitioner's gross income for the year 1937 an amount equal to the aggregate of the depletion deductions taken by petitioner and allowed by the [fol. 62] respondent for each of the years 1929 to 1936, inclusive, with the exception of the year 1933.

3. The Board erred in failing to hold as a conclusion of law that it was improper to include in the gross income for 1937 any amount based upon depletion deductions taken by petitioner and allowed by the respondent for any of the years 1929 to 1936, inclusive.

Wherefore, Petitioner petitions that the aforesaid decision of the Board be reviewed and that the errors of said decision be corrected by appropriate action of this Court.

Dated: July 29th, 1942.

James E. O'Brien & Kimball B. DeVoy, Counsel for Petitioner, 808 First National-Soo Line Bldg., Minneapolis, Minnesota.

Duly sworn to by James E. O'Brien and Kimball B. DeVoy. Jurats omitted in printing.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING OF PETITION FOR REVIEW BY BESSIE P. DOUGLAS IN CASE NO. 102870 AND ACKNOWLEDGMENT OF SERVICE—Filed August 3, 1942

To: John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

Please take notice that the petitioner on the 3rd day of August, 1942, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the Board heretofore rendered in the above entitled cause, a copy of which petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of July, 1942 at Minneapolis, Minnesota.

Respectfully, James E. O'Brien & Kimball B. DeVoy, Counsel for Petitioner, 808 First National-Soo Line Bldg., Minneapolis, Minnesota.

[fol. 64] Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 3rd day of August, 1942.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

In the United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted]

Petition of Guy T. Helvering, Commissioner of Internal Revenue, in Case No. 102870 for Review of Decision of United States Board of Tax Appeals—Received and Filed August 7, 1942

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Guy T. Helvering, Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Eighth Circuit to review the decision entered by the United States Board of Tax Appeals on May 9, 1942, ordering and deciding that there is a deficiency in income tax for the calendar year 1937 in the amount of $26,977.56 due from the taxpayer, Bessie P. Douglas, the respondent on review. The taxpayer's individual income tax return for the calendar year 1937 was filed with the Collector of Internal Revenue for the District of Minnesota, located at St. Paul, Minnesota.

The question presented is whether the Board erred in holding that the amount of $4,958.05 representing the depletion deduction claimed and allowed in 1933 on account of minimum royalties received from a mineral lease which was terminated in 1937 by the lessee without any ore having [fol. 65] been extracted, did not effect an offset in taxable income for 1933, since the taxpayer had a net loss for that year of $8,989.46 aside from the depletion deduction, and, therefore, the amount of the deduction may not be included in taxpayer's gross income for 1937. In his deficiency notice the Commissioner included in taxpayer's gross income for 1937 the amount of $53,290.03 representing the total of depletion deductions claimed by and allowed to the tax-payer for prior years with respect to minimum royalties received in such years from the mineral lease in question. The Board held that the Commissioner's action was correct except as to the amount of $4,958.05 representing the depletion deduction taken by the taxpayer in 1933. The Board said that the 1933 deduction did not effect an offset

of taxable income and, therefore, the Commissioner erred in including said $4,958.05 in income for 1937.

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and decision rendered and entered by the United States Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following points on which he intends to rely in this proceeding:

1. The United States Board of Tax Appeals erred in holding that the depletion deduction claimed and allowed in 1933 in the amount of $4,958.05 on account of minimum royalties received in that year from a mineral lease which was terminated in 1937 by the lessee without any ore having been extracted, did not effect an offset in taxable income for 1933 since taxpayer had a net loss for that year of $8,989.46 aside from the depletion deduction, and, therefore, the amount of the deduction may not be included in taxable income for 1937, and in overruling the Commissioner's determination in including said amount of $4,958.05 in taxpayer's 1937 income.

2. The United States Board of Tax Appeals erred in holding that there is a deficiency in income tax for the calendar year 1937 in the amount of only $26,977.56.

[fol. 66] 3. The United States Board of Tax Appeals erred in failing to hold that there is a deficiency in income tax for the calendar year 1937 in the amount of $30,024.60.

4. The United States Board of Tax Appeals erred in failing to hold that the sum of $4,958.05 representing the depletion deduction claimed and allowed in 1933 should be included in taxable income for 1937 whether or not taxpayer received a tax benefit from the deduction in 1933.

5. The United States Board of Tax Appeals erred in that its opinion and decision are contrary to its findings of fact.

6. The United States Board of Tax Appeals erred in that its opinion and decision are not supported by its findings of fact and are contrary to law.

Samuel O. Clark, Jr., Assistant Attorney General;
J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

NOTICE OF FILING OF PETITION FOR REVIEW BY GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, IN CASE NO. 102870, AND ACKNOWLEDGMENT OF SERVICE—Received and Filed August 18, 1942

To: Bessie P. Douglas, 2424 Park Avenue, Minneapolis, Minnesota.

You are hereby notified that the Commissioner of Internal Revenue did on the 7th day of August, 1942, file with [fol. 67] the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 7th day of August, 1942.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 11 day of Aug., 1942.

Bessie P. Douglas, Respondent on Review.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION OF ESTATE OF CHARLES H. ROBINSON, ET AL., CO-EXECUTORS, IN CASE NO. 102869 FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.—Filed August 3, 1942.

* * * * * * *

To: The Honorable, The Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Northwestern National Bank and Trust Company of Minneapolis, Jessie P. Robinson and Charles J. Robinson,

Co-executors of the Estate of Charles H. Robinson, the petitioners in the above entitled matter, by James E. O'Brien and Kimball B. DeVoy, their counsel, hereby file their petition for a review by the United States Circuit [fol. 68] Court of Appeals for the Eighth Circuit of the decison by the United States Board of Tax Appeals rendered on May 9, 1940, 46 B. T. A., * * * No. 125, determining a deficiency in the petitioners' Federal Income Tax for the calendar year 1937, in the amount of $1,532.38, and respectfully show:

I.

JURISDICTION

The petitioner, Northwestern National Bank and Trust Company of Minneapolis, at the time of filing this petition is a national banking association organized under the laws of the United States, having its principal office and place of business at Minneapolis, Minnesota. The petitioners, Jessie P. Robinson and Charles J. Robinson, at the time of filing this petition are individuals, citizens of the United States and residents of Minneapolis, Minnesota. These three petitioners are and at all times material in this proceeding have been Co-executors of the Estate of Charles H. Robinson. They filed the Federal Income Tax return of said estate for the year 1937, the period here involved, at the office of the Collector of Internal Revenue for the District of Minnesota, in St. Paul, Minnesota, which is located within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit. Subsequent to the decision of the Board, review of which is herein sought, petitioners paid in full the deficiency thereby determined, together with interest thereon as provided by law to the date of said payment.

II

NATURE OF THE CONTROVERSY

The controversy involves the propriety of cumulating income received by a cash-basis taxpayer in each of a series of five years, adding the accumulated total to the gross income of the sixth year, and assessing the tax thereon at progressive rates for the sixth year.

The facts giving rise to this controvery are substantially as follows:

Prior to 1929 Charles H. Robinson, Bessie P. Douglas, Adeline R. Morse and Irene B. Robinson Cirkler, were the [fol. 69] owners of the Pettit iron mine in St. Louis County, Minnesota. Charles H. Robinson owned an undivided one-sixth interest in this property. In 1929 these owners leased the mine to the Republic Steel Company for a term of thirty (30) years commencing July 1, 1929.

Charles H. Robinson died on August 16, 1932 and thereafter the estate of Charles H. Robinson, petitioner herein, received the income from this property.

In each of the years 1932 to 1936, inclusive, the Estate of Charles H. Robinson received certain advance or minimum royalties. For each of these years the Estate of Charles H. Robinson claimed depletion deductions in its Federal income tax returns on account of said advance royalties. These depletion deductions were taken on the cost basis and were allowed by the respondent as proper deductions.

As of July 1, 1937, pursuant to the provisions of the lease, the Lessee cancelled and terminated the lease. No ore had been removed from the mine at any time during the existence of the lease.

In its Federal income tax return for 1937 the Estate of Charles H. Robinson reported no income by reason of the depletion deductions allowed to it for the years 1932 to 1936, inclusive.

Upon audit of petitioner's return for 1937 the respondent added to the gross income reported therein an amount equal to the aggregate of the deductions for depletion taken by it on each of its returns for the five years, 1932 through 1936, and based his determination of the deficiency upon this addition. The respondent made this addition pursuant to Article 23m—10(c) of Regulations 94. The Board sustained the action of the Commissioner in adding these amounts to petitioner's income for the year 1937.

Petitioner's position was and is that the inclusion of any of these amounts in the 1937 gross income constitutes an unlawful cumulation into one year of income received by it in a series of years.

III

Petitioners, being aggrieved by the conclusions of law contained in the opinion of the Board and by its decision [fol. 70] entered pursuant thereto, desire to obtain a review

thereof by the United States Circuit Court of Appeals for the Eighth Circuit.

IV

Assignments of Error

The petitioners assign as error the following acts of the Board of Tax Appeals:

1. The Board erred in holding as a conclusion of law that it was proper to include in petitioners' gross income for 1937 $379.13 of the depletion deduction taken and allowed for the year 1932.

2. The Board erred in holding as a conclusion of law that it was proper to include in peaitioners' gross income for the year 1937 an amount equal to the aggregate of the depletion deductions taken by petitioners and allowed by the respondent for each of the years 1932 to 1936, inclusive.

3. The Board erred in failing to hold as a conclusion of law that it was improper to include in the gross income for 1937 any amount based upon depletion deductions taken by petitioners and allowed by respondent for any of the years 1932 to 1936, inclusive.

Wherefore, Petitioners petition that the aforesaid decision of the Board be reviewed and that the errors of said decision be corrected by appropriate action of this Court.

James E. O'Brien & Kimball B. DeVoy, Counsel for Petitioners, 808 First National-Soo Line Bldg., Minneapolis, Minnesota.

Dated: July 29th, 1942.

Duly sworn to by James E. O'Brien and Kimball DeVoy. Jurats omitted in printing.

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING OF PETITION FOR REVIEW BY ESTATE OF CHARLES H. ROBINSON, ET AL., CO-EXECUTORS, IN CASE No. 102,869, AND ACKNOWLEDGMENT OF SERVICE—Filed August 3, 1942

[fol. 72] To: John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

Please take notice that petitioners on the 3rd day of August, 1942, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C. a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the Board heretofore rendered in the above entitled cause, a copy of which petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of July, 1942, at Minneapolis, Minnesota.

Respectfully, James E. O'Brien & Kimball B. DeVoy, Counsel for Petitioners, 808 First National-Soo Line Bldg., Minneapolis, Minnesota.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 3rd day of August, 1942.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION OF BERNICE B. DALRYMPLE IN CASE NO. 106,705 FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS—Filed August 3, 1942

To: The Honorable, The Judges of The United States Circuit Court of Appeals For The Eighth Circuit:

[fol. 73] Bernice B. Dalrymple, the petitioner in the above entitled matter, by James E. O'Brien and Kimball

B. DeVoy, her counsel, hereby files her petition for a review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision by the United States Board of Tax Appeals rendered on May 9, 1940, 46 B. T. A. ....., No. 125, determining a deficiency in the petitioner's Federal income tax for the calendar year 1937, in the amount of $5,412.47, and respectfully shows:

I

Jurisdiction

The petitioner, Bernice B. Dalrymple, at the time of filing this petition is an individual, a citizen of the United States and a resident of Minneapolis, Minnesota, with her office at 953 Northwestern Bank Building, Minneapolis, Minnesota. Petitioner is the transferee of all of the assets of the Estate of Irene B. Robinson Cirkler, deceased. The Federal Income Tax return herein involved is the return for Irene B. Robinson Cirkler, deceased, an individual, covering the period from January 1, 1937 to October 20, 1937, the date of her death. The return involved was filed at the office of the Collector of Internal Revenue for the District of Minnesota, in St. Paul, Minnesota, which is located within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit. Subsequent to the decision of the Board, review of which is herein sought, petitioner paid in full the deficiency thereby determined, together with interest thereon as provided by law to the date of said payment.

II

Nature of Controversy

The controversy involves the propriety of cumulating income received by a cash-basis taxpayer in each of a series of eight years, adding the accumulated total to the gross income of the ninth year, and assessing the tax thereon at progressive rates for the ninth year.

The facts giving rise to this controversy are substantially as follows:

[fol. 74] Prior to 1929 Irene B. Robinson Cirkler, Bessie P. Douglas, Adeline R. Morse and Charles H. Robinson, were the owners of the Pettit iron mine in St. Louis County, Minnesota. Irene B. Robinson Cirkler, whose tax liability

is here in question, owned an undivided one-sixth interest in this property. In 1929 these owners leased the mine to the Republic Steel Company for a term of thirty (30) years commencing July 1, 1929.

In each of the years 1929 to 1936, inclusive, Irene B. Robinson Cirkler received certain advance or minimum royalties. For each of these years she claimed depletion deductions in her Federal income tax returns on account of said advance royalties. These depletion deductions were taken on the cost basis and were allowed by the respondent as proper deductions.

As of July 1, 1937, pursuant to the provisions of the lease, the Lessee cancelled and terminated the lease. No ore had been removed from the mine at any time during the existence of the lease.

In the Federal income tax return filed for Irene B. Robinson Cirkler for the period January 1, 1937, to October 20, 1937, no income was reported by reason of the depletion deductions allowed to her for the years 1929 to 1936, inclusive.

Upon audit of the return of the respondent added to the gross income reported therein an amount equal to the aggregate of the deductions for depletion taken by her on each of her returns for the eight years 1929 through 1936, and based his determination of the deficiency upon this addition. The respondent made this addition pursuant to Article 23m-10(c) of Regulations 94. The deficiency as thus determined was assessed against this petitioner as transferee of all of the assets of the Estate of Irene B. Robinson Cirkler, deceased. The Board sustained the action of the Commissioner in adding these amounts to Irene B. Robinson Cirkler's income for the period January 1, 1937 to October 20, 1937.

Petitioner's position was and is that the inclusion of any of these amounts in the 1937 gross income constitutes an unlawful cumulation into one year of income received by the taxpayer in a series of years.

[fol. 75] III

Petitioner, being aggrieved by the conclusions of law contained in the opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof

by the United States Circuit Court of Appeals for the Eighth Circuit.

IV

Assignments of Error

The petitioner assigns as error the following acts of the Board of Tax Appeals:

1. The Board erred in its conclusion of law that it was proper to include in the taxpayer's gross income for the period January 1, 1937 to October 20, 1937 an amount equal to the aggegate depletion deductions taken by petitioner and allowed by the respondent for each of the years 1929 to 1936, inclusive.

2. The Board erred by failing to hold as a conclusion of law that it was improper to include in the gross income for the period January 1, 1937 to October 20, 1937 any amount based upon depletion deductions taken by taxpayer and allowed by the respondent for any of the years 1929 to 1936, inclusive.

Wherefore, Petitioner petitions that the aforesaid decision of the Board be reviewed and that the errors of said decision be corrected by appropriate action of this Court.

James E. O'Brien, & Kimball B. DeVoy, Counsel for Petitioner, 808 First National-Soo Line Building, Minneapolis, Minnesota.

Dated: July 29th, 1942.

Duly sworn to by James E. O'Brien and Kimball B. DeVoy. Jurat omitted in printing.

[fol. 76] In United States Circuit Court of Appeals

[Title omitted]

Notice of Filing of Petition for Review by Bernice B. Dalrymple in Case No. 106705 and Acknowledgment of Service—Filed August 3, 1942

To: John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

Please take notice that the petitioner on the 3rd day of August, 1942, filed with the Clerk of the United States

[fol. 77] Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the Board heretofore rendered in the above entitled cause, a copy of which petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of July, 1942, at Minneapolis, Minnesota.

James E. O'Brien, & Kimball B. DeVoy, Counsel for Petitioner, 808 First National-Soo Line Bldg., Minneapolis, Minnesota.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 3rd day of August, 1942.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Titles omitted]

ORDER FOR TRANSMISSION OF SINGLE CONSOLIDATED TRANSCRIPT OF RECORD AND AS TO CONSOLIDATION OF CASES FOR BRIEFING, HEARING, ARGUMENT AND DECISION, ETC.—Filed September 3, 1942.

B. T. A. Nos. 102869, 102870 and 106,705

[fol. 78] Now on consideration of the joint motion filed herein by counsel for the respective parties to the above-entitled proceedings, it is

Ordered, that the Clerk of the United States Board of Tax Appeals shall certify and transmit to this Court a single consolidated transcript of record on review in the above-entitled proceedings; that these proceedings be and they are hereby consolidated for briefing, hearing, argument and decision; that one brief shall be filed on behalf of the taxpayers and one on behalf of the Commissioner; and that the first brief shall be filed by the taxpayer who

shall print the consolidated record with such brief and shall bear 75 per centum of the cost of printing the record, leaving 25 per centum of such cost to be borne by the Commissioner.

It Is Further Ordered that the Clerk of this Court transmit to the Clerk of the United States Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

August 31, 1942.

A True Copy.

Attest:

E. E. Koch, Clerk, United States Circuit Court of Appeals, Eighth Circuit. (Seal.)

[fol. 79]. Before United States Board of Tax Appeals

* * * * * * *

Praecipe for Consolidated Record—Filed September 29, 1942

To The Clerk of The United States Board of Tax Appeals:

You are hereby requested by the parties to each of the above entitled causes to make a transcript of the consolidated record therein to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to review taken in each of said causes and to include in such transcript of record copies, duly certified as correct, of the following documents:

1. Docket entries of proceedings in each of said causes before the Board.

2. Pleadings in each of said causes before the Board as follows:

(1) Amended Petition of Bessie P. Douglas, filed July 27, 1940.

(2) Answer to Amended Petition of Bessie P. Douglas, filed August 29, 1940.

[fol. 80] (3) Amendment to Amended Petition of Bessie P. Douglas (embodied in petitioner's motion filed December 6, 1940, granted December 12, 1940).

(4) Answer to Amendment to Amended Petition of Bessie P. Douglas, filed January 22, 1941.

(5) Amended Petition of Estate of Charles H. Robinson, filed July 27, 1940.

(6) Answer to Amended Petition of Estate of Charles H. Robinson, filed August 29, 1940.

(7) Amendment to Amended Petition of Estate of Charles H. Robinson (embodied in petitioners' motion filed December 6, 1940, granted December 12, 1940).

(8) Answer to Amendment to Amended Petition of Estate of Charles H. Robinson, filed January 22, 1941.

(9) Petition of Bernice B. Dalrymple, filed March 20, 1941.

(10) Answer to Petition of Bernice B. Dalrymple, filed April 22, 1941.

(11) Reply to Answer to Petition of Bernice B. Dalrymple.

3. Stipulations of fact, as follows:

(1) Written stipulation of fact submitted at hearing before the Board, June 16, 1941.

(2) Oral Stipulation of fact submitted at hearing before the Board, June 16, 1941.

4. Opinion of the Board, promulgated April 14, 1942, including findings of fact therein.

5. Decisions of the Board entered May 9, 1942.

6. The Petitions for Review filed by taxpayers in each of said causes.

7. The Cross-petition for Review filed by The Commissioner in the case of Bessie P. Douglas.

8. Notice of filing petition for review and admission of service thereof in each of said causes.

[fol. 81] 9. This Praecipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

James E. O'Brien & Kimball B. DeVoy, Counsel for Taxpayers. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Commissioner of Internal Revenue.

Dated: —— —, 1942.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 82] In United States Circuit Court of Appeals for the Eighth Circuit

* * * * * * *

Designation of Portions of Record to be Contained in Printed Record on Petitions for Review.—Filed October 28, 1942

To the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit:

The following portions of the consolidated record in the above-entitled causes are hereby designated as the portions of said record to be printed, as provided in order made by this Court on August 31, 1942, to-wit:

All of said record as certified by the Clerk of the Board of Tax Appeals and as filed herein except;

[fol. 83] 1. That portion of the written stipulation of fact submitted to the Board on June 16, 1941, which is referred to in paragraph A2 as Exhibit A, and which consists of a copy of lease and a copy of amendment thereto.

2. That portion of the aforesaid written stipulation of fact which relates to the case of Estate of Adeline R. Morse, John S. Dalrymple, Executor, contained in paragraph "C" of said stipulation and in subparagraphs 13, 14, 15, 16, 17, 18 and 19 under said paragraph "C".

3. That portion of amended petition of Bessie P. Douglas contained in subparagraphs 5(2), 5(3), 5(4), 5(9), 5(10), 5(11), and 5(12).

4. Amendment to amended petition of Bessie P. Douglas.

5. Answer to amendment to amended petition of Bessie P. Douglas.

6. That portion of amended petition of Estate of Charles H. Robinson contained in subparagraphs 5(3), 5(4), 5(9), 5(10), 5(11), and 5(12).

7. Amendment to amended petition of Estate of Charles H. Robinson.

8. Answer to amendment to amended petition of Estate of Charles H. Robinson.

9. That portion of amended petition of Bernice B. Dalrymple contained in subparagraphs 5(2), 5(3), 5(4), 5(9), 5(10), 5(11), 5(12) and 5(13).

James E. O'Brien & Kimball B. DeVoy, Counsel for Taxpayers. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Commissioner of Internal Revenue.

[File endorsement omitted.]

[fol. 84] (Appearances of counsel omitted in printing)

[fol. 85] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12461

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

No. 12462

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

BESSIE P. DOUGLAS

On Petition to Review Decision of United States Board of Tax Appeals

No. 12463

ESTATE OF CHARLES H. ROBINSON, et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

and

No. 12464

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

ORDER OF SUBMISSION—March 2, 1943

These causes, Nos. 12461, 12462, 12463 and 12464, having been called for hearing in their regular order, the same are argued together by Mr. Kimball B. DeVoy for the taxpayers and by Miss Louise Foster, Special Assistant to Attorney General, for the Commissioner of Internal Revenue.

[fol. 86] Thereupon, these causes were submitted to the Court on the abstracts of records from said Board of Tax Appeals and the briefs of counsel filed herein.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12,461.—March Term, A. D. 1943

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

No. 12,462.—March Term, A. D. 1943

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

BESSIE P. DOUGLAS, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

No. 12,463.—March Term, A. D. 1943

ESTATE OF CHARLES H. ROBINSON, NORTHWESTERN NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, JESSIE P. ROBINSON and CHARLES J. ROBINSON, Co-executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

No. 12,464.—March Term, A. D. 1943

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

[fol. 88] Mr. Kimball B. DeVoy (Mr. James E. O'Brien was with him on the brief) for Taxpayers.

Miss Louise Foster, Special Assistant to the Attorney General (Mr. Samuel O. Clark, Jr., Assistant Attorney General, and Messrs. Sewall Key and A. F. Prescott, Special Assistants to the Attorney General, were with her on the brief) for Commissioner of Internal Revenue.

Before Gardner, Sanborn and Thomas, Circuit Judges.

OPINION—April 7, 1943

THOMAS, Circuit Judge, delivered the opinion of the court:

These appeals of three taxpayers from a decision (46 B. T. A. 943) of the United States Board of Tax Appeals, now the United States Tax Court, and a cross appeal of the Commissioner present two problems for determination: 1. Whether Article 23(m)-10(c) of Treasury Regulations 94 promulgated under the Revenue Act of 1936 is valid; and 2. If the regulation is valid, may the taxpayer in the taxable year exclude a depletion deduction taken in a former year when no tax benefit resulted from the deduction in the earlier year?

Both these problems have heretofore been determined by this court. In a similar case, *Lamont* v. *Commissioner*, 8 Cir., 120 F. 2d 996, the court held the regulation to be valid, and in *Harwick* v. *Commissioner*, 8 Cir., 133 F. 2d 732, the tax benefit theory was held to be invalid. Since the taxpayers contend that these cases are distinguishable from the Lamont case, supra, it will be necessary to examine the facts and the issues.

On July 1, 1929, four owners of an iron mine in Minnesota leased it to an operating company for a term of 30 years. The lease provided for the payment of minimum [fol. 89] royalties annually whether ore was extracted or not. Royalties paid in advance of extraction were to be applied on ore mined later. The lessee was given the right to cancel the lease; and this right was exercised and the lease terminated July 1, 1937, without any ore having been removed from the mine during the existence of the lease.

While the lease was in force the agreed royalties were paid to the lessors or their successors and returned by them as gross income in the years received. In the same years deductions for depletion were taken and allowed. For 1937, the year in which the lease was terminated, the Commissioner, pursuant to the provisions of paragraph (c) of

Article 23(m)-10 of Regulations 94, promulgated under the Revenue Act of 1936, included in the gross income of the several taxpayers sums corresponding to the aggregate amounts of the deductions taken by each of them, or of their transferors, during the years the lease was in force from 1929 to 1937.

The case of the taxpayer Douglas differs from the others in that, although she took and was allowed a depletion deduction for the year 1933 in the amount of $4,958.05, her net loss for that year before taking the deduction was $8,989.46. This situation gives rise to the second question presented for decision.

Upon appeal to the Board of Tax Appeals the Commissioner's action in including in taxable income for 1937 amounts equivalent to the depletion deductions taken and allowed in prior years was sustained in all of the cases involved except as to the $4,958.05 in the Douglas case. In respect of this item the Commissioner was reversed on the ground that the deduction in 1933 did not offset a taxable income, that is, that the taxpayer received no tax benefit from the deduction.

[fol. 90] The contention of all the taxpayers in this court is that the Board erred in sustaining the action of the Commissioner in including sums corresponding to the aggregate depletion deductions of prior years in taxable income of 1937. The taxpayers insist that the regulation, which with the statute is copied in the margin,[1] is invalid

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[1] Section 23 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, provides:

In computing net income there shall be allowed as deductions:

* * * * * * *

(m) *Depletion.*—In the case of mines, * * * a reasonable allowance for depletion * * *; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

because (1) unreasonable and (2) in conflict with the statute.

The taxpayers' charge of invalidity is directed against the last phrase of paragraph (c) of Article 23(m)-10 of Regulations 94. This paragraph provides that if depletion deductions are allowed for advance royalties and no production occurs during the life of the lease, "the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a cor- [fol. 91] responding amount must be returned as income *for the year in which the lease expires, terminates, or is abandoned.*" (Italics supplied.)

The taxpayers' only "essential quarrel" is with the phrase printed in italics, although the validity of all of paragraph (c) is questioned. The objection to the regulation is based upon the claim (1) that it requires income received in one year to be included in the income of a later year in which it was not received; (2) that it cumulates income received in each of a series of years and taxes it as if received in one year; and (3) that the regulation thus imposes a penalty upon the taxpayer, is harsh and unrea-

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Art. 23(m)-10. *Depletion—Adjustments of accounts* based on bonus or advanced royalty.—* * *

(b) If the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall * * * pay, annually, a specified sum of money which shall be applied in payment of the * * * royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, an amount equal to that part of the basis for depletion allocable to the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made.

(c) If for any reason any such mineral lease expires or terminates or is abandoned before the mineral which has been paid for in advance has been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned.

sonable, lacks common sense justification, is vicious in its results, is not equitable, and violates the statute.

Section 23(m) of the Revenue Act of 1936, supra, has been in the law continuously in substantially similar form beginning with the Revenue Act of 1918; and Article 23(m)-10(c) of Regulations 94 had its beginning in Regulations 45 under the Act of 1918 and has existed in the regulations ever since. It was approved in effect by the Supreme Court in *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299. But in *Herring* v. *Commissioner*, 293 U. S. 322, 328, decided after the Murphy Oil Co. case, the court said, "As to income tax liability in the year of termination of the lease, on account of bonus paid at the execution of the lease, if no mineral has been extracted, we express no opinion." Because of this expression of the Supreme Court, the taxpayers contend that the validity of the regulation is an open question. Congress, however, has shown its approval of the regulation by the repeated reenactment of the statute without any change in the regulation. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 307-8. Its validity has been sustained by this court in *Lamont* v. *Commissioner, supra;* and by the [fol. 92] 5th Circuit Court of Appeals in *Sneed* v. *Commissioner*, 119 F. 2d 767, and *Crabb* v. *Commissioner*, 119 F. 2d 772.

The contention that the regulation requires income in one year to be included in the income of a later year in which it was not received, thus cumulating income for a series of years, is erroneous. Depletion deductions are allowed on the theory that depletion represents the costs of a wasting capital asset. *United States* v. *Ludley*, 274 U .S. 295, 302. When claimed and allowed depletion is treated and regarded as a reduction, or loss, of capital. When a mining lease is terminated without production the amounts allowed as deductions for such assumed capital losses resulting from advance payments in prior years may for the first time be regarded as income. Until then the depletion deduction is carried on the books of the taxpayer as a capital loss; and, as between the taxpayer and the Commissioner, it retains that status until it is determined upon expiration of the lease that the mineral paid for in advance was not removed from the mine. The status of the depletion deduction then, and not until then, changes from capital loss to income both on the books of the lessor-taxpayer and for

tax purposes. This is the condition upon which the deduction is allowed. In the present case the same regulation being in effect during each year the lease was in effect, and in which year the deduction was claimed and allowed, the rule applies to the allowance in each year severally. While the total amount returned as income in 1937 corresponded to the aggregate amount of the deductions in prior years, it was not the deductions which were returned as income. It was only an equal amount. None of the several amounts returned was regarded as income in the prior years. They could not be so regarded prior to 1937.

Depletion allowed as a deduction in such a case is analogous to a deduction properly taken for a reserve for [fol. 93] some specific purpose where it is afterwards discovered that more was reserved and deducted than necessary in one year, and the excess having been restored to the original account on the books of the taxpayer was released for general use in a later year. The amount so released must be added to income in the year when made available as income. See *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 352. A regulation requiring such procedure is neither unreasonable nor violative of any statute. The fact that in particular cases the application of the regulation may cumulate amounts corresponding to depletion deductions allowed in several previous years does not affect the logic nor the validity of the procedure. The same rule applies to deductions for depreciation. Further illustrations of the application of the principle of the regulation are given in the opinion of the court in *Sneed* v. *Commissioner*, *supra*, at page 771.

The complaint that the regulation is harsh and imposes a penalty upon the taxpayer was presented to the Board and overruled. The Board observed that the hardship complained of does not result entirely from the regulation but results in part from the fact that the income tax rates were increased over the period 1929 to 1937, and the depletion deductions were taken in years in which the incomes of the taxpayers were at comparatively low levels. Had the situation been reversed, a saving in taxes instead of a loss might have resulted from cumulating the amounts of the prior deductions in 1937. There would have been a saving had the tax rate been substantially lower in 1937 than in the former years and the incomes of the taxpayers

substantially greater in those years than in 1937. A tax law is not required to operate uniformly upon all taxpayers and according to the peculiar and fortuitous circumstances of each one. Geographic, not intrinsic, uni-[fol. 94] formity is all that is required. *Bromley* v. *McCaughn*, 280 U. S. 124; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1.

We hold that the regulation complained of is valid, and that the Board correctly so found.

The Commissioner contends that the Board erred in excluding from taxation in 1937 the sum of $4,958.05 deducted by Mrs. Douglas as depletion in 1933 on the ground that she had sustained a net loss in that year and for that reason had received no tax benefit on account of the deduction.

The principle upon which the tax benefit theory rests is that where the depletion deduction claimed and allowed in the prior year did not effect an offset of taxable income in that year, the amount released by restoring to the capital account the cost of the ore paid for but not removed in a later year does not constitute taxable income for the year in which it was released. If valid, the principle is applicable to the recovery of capital in any taxable year, the loss of which was charged off and for which a deduction was claimed and allowed in a prior year.

Since the Board's decision was rendered in the case of Mrs. Douglas this court has rejected the tax benefit theory in *Harwick* v. *Commissioner*, 8 Cir., 133 F. 2d. 732. It has also been rejected by the 4th Circuit Court of Appeals in *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. 2d 44, and in *Helvering* v. *Virginian Hotel Corporation*, 132 F. 2d 909.

The grounds upon which this court rejects the principle applied by the Board are: (1) That it is not in accordance with law, making it our duty to reverse under the statute. 26 U. S. C. § 1141(c) (1), Supp. 1939. The principle under consideration is not found in the statute nor any of the [fol. 95] regulations, and it injects into the law of deductions an equitable consideration contrary to the strict construction required to be placed upon statutes allowing deductions. *Deputy* v. *du Pont*, 308 U. S. 488, 493; *Harwick* v. *Commissioner, supra.* (2) The taxpayer is given an option to take or not to take a deduction for depletion. If he takes

and is allowed a deduction he takes it subject to the conditions prescribed by the law in effect in the year of allowance. In the instant case Article 23(m)-10(c), of Regulations 94 was in effect in 1933 when Mrs. Douglas took and was allowed the deduction involved in this controversy. Since the regulation was valid, it had the force and effect of law. *Maryland Casualty Co.* v. *United States, supra,* at page 349. The allowance of the deduction was therefore subject to the condition prescribed by the regulation, that is, that in the event no ore was mined during the continuance of the lease an amount corresponding to the amount of the deduction would be included in income in the year of the termination of the lease. The regulation involved does not exempt such income from deductions for losses occurring in the taxable year. It is consistent with the rule that under the federal system of taxation income must be computed annually as the net result of all transactions within the year. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 365.

For the foregoing reasons the cases are all affirmed on the petitions of the taxpayers, and No. 12,462, Commissioner v. Douglas, is reversed on the petition of the Commissioner.

[fol. 96] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12461

BESSIE P. DOUGLAS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

and

No. 12462

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

BESSIE P. DOUGLAS

On Petition to Review Decision of United States Board of Tax Appeals

JUDGMENT—April 7, 1943

These causes came on to be heard on the petitions filed by the Taxpayer and the Commissioner of Internal Revenue to review the decision of the United States Board of Tax Appeals, entered May 9, 1942, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the said Board of Tax Appeals in these causes upon the petition of the Taxpayer be, and it is hereby, affirmed, and that on the petition of the Commissioner the said decision be, and the same is hereby, reversed.

And it is further Ordered by this Court that no costs be taxed in favor of either of the parties in this Court, and that these causes be and they are hereby remanded to The Tax Court of the United States as the Successor to the United States Board of Tax Appeals.

[fol. 97] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12463

ESTATE OF CHARLES H. ROBINSON, NORTHWESTERN NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, JESSIE P. ROBINSON and CHARLES J. ROBINSON, Co-Executors, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

JUDGMENT—April 7, 1943

This cause came on to be heard on the petition to review the decision of the United States Board of Tax Appeals entered May 9, 1942, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the petition to review herein be, and it is hereby, dismissed without taxation of costs in favor of either of the parties in this Court.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12464

BERNICE B. DALRYMPLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

JUDGMENT—April 7, 1943

This cause came on to be heard on the petition to review the decision of the United States Board of Tax Appeals entered May 9, 1942, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the petition to review herein be, and it is hereby, dismissed without taxation of costs in favor of either of the parties in this Court.

[fols. 99-100] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 130

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 10, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 102] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 131

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 10, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 103] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 132

ORDER ALLOWING CERTIORARI—Filed January 10, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 104] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 133

ORDER ALLOWING CERTIORARI—Filed January 10, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Thomas P. Helmey. File Nos. 47623, 47624, 47625, 47626. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 130. Bessie P. Douglas, Petitioner, vs. Commissioner of Internal Revenue. Term No. 131. Bessie P. Douglas, Petitioner, vs. Commissioner of Internal Revenue. Term No. 132. Estate of Charles H. Robinson, Northwestern National Bank and Trust Company of Minneapolis, Jessie P. Robinson, et al., etc., Petitioners, vs. Commissioner of Internal Revenue. Term No. 133. Bernice B. Dalrymple, Petitioner, vs. Commissioner of Internal Revenue. Petition for writs of certiorari and exhibit thereto. Filed July 1, 1943. Term Nos. 130 O. T. 1943, 131 O. T. 1943, 132 O. T. 1943, 133 O. T. 1943.